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No.

In the Supreme Court of the United States

October Term, 1983

ALCAN ALUMINIUM LIMITED,
Petitioner,

vs.

THE FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, Operating Through Its New York Office; FRANK GOODMAN, Individually, and As District Manager, New York Office of the Franchise Tax Board of the State of California; and JOSEPH E. GEOGHEGAN, Individually, and As Supervisor-Audit Group, New York Office of the Franchise Tax Board of the State of California,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Second Circuit

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QUESTION PRESENTED

1. Did the Second Circuit err in finding, as a matter of law, that the Respondents' unitary tax on domestic subsidiary-foreign parent combinations does not constitute a tax burden upon Petitioner's foreign activities in violation of the Foreign Commerce and Due Process Clauses of the United States Constitution and that therefore Petitioner lacks standing to bring this action?

RULE 28.1 STATEMENT

Petitioner is a Canadian corporation and has no United States subsidiaries or related companies that are not wholly owned. Petitioner has no parent corporation.

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No.

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THE FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, Operating Through Its New York Office; FRANK GOODMAN, Individually, and As District Manager, New York Office of the Franchise Tax Board of the State of California; and JOSEPH E. GEOGHEGAN, Individually, and As Supervisor-Audit Group, New York Office of the Franchise Tax Board of the State of California,
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PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Second Circuit

OPINIONS BELOW

The decision of the Court of Appeals for the Second Circuit adopting the opinion of the United States District Court for the Southern District of New York is unreported

and is set forth in Appendix I. The decision of the District Court dismissing this case is reported at 558 F. Supp. 624 (S.D.N.Y. 1983) and is set forth in Appendix II. The first opinion of the District Court, which stayed this case, is reported at 539 F. Supp. 512 (S.D.N.Y. 1982) and is set forth in Appendix III.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on June 17, 1983. On September 7, 1983, Justice Marshall extended the time for filing this Petition for Certiorari to and including October 14, 1983. This Court's jurisdiction is invoked under 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional challenge in this case is under the Foreign Commerce and Due Process Clauses of the United States Constitution: "The Congress shall have the power to regulate commerce with foreign Nations and among the several states and with the Indian tribes." Article I §8, cl. 3; "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." 14th Amendment. Involved also is 28 U.S.C. §1341 (Tax Injunction Act) which states: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

STATEMENT OF THE CASE

Petitioner Alcan Aluminium Limited (hereinafter "Petitioner") is a corporation organized and existing under the laws of Canada; its headquarters and principal place of business are in Montreal, Quebec. Petitioner and various of its subsidiaries are engaged in all phases of the aluminum business on an international scale. Petitioner and nearly one hundred of its subsidiaries operate in several different countries—all wholly outside the United States. Neither Petitioner nor any of its non-United States subsidiaries ("foreign subsidiaries") does business in the United States.

Petitioner indirectly owns all of the issued stock of Alcan Aluminum Corporation (hereinafter "Alcancorp"). Alcancorp is a corporation organized and existing under the laws of the State of New York; its principal place of business is at Cleveland, Ohio. Alcancorp and its subsidiaries are engaged in the business of fabricating and selling various aluminum products in the United States. Certain of the activities of Alcancorp are conducted in the State of California.

The Respondents in this case are the Franchise Tax Board of the State of California, Frank Goodman, District Manager of the New York Office of the Tax Board, and Joseph E. Geoghegan, Supervisor-Audit Group of the New York Office of the Tax Board.

Respondents assess franchise taxes on companies doing business in the State of California on what is known as a "unitary" basis.[1] Under this method of taxation, the income of a company "attributable" to California is calculated by a formula which multiplies the total net income of the company, its parent, the subsidiaries of the parent

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1. *See* Cal. Rev. & Tax Code §§25120-25140 (West 1979).

and its own subsidiaries by the relative percentage of that combined "unitary" group's property, payroll and sales in California.

In computing the franchise taxes due California, Respondents have ignored the corporate distinctions between Petitioner, its foreign subsidiaries and Alcancorp. They have computed the tax due using the income of Petitioner and of its foreign subsidiaries as well as Alcancorp's income, notwithstanding the fact that Petitioner and its foreign subsidiaries conduct no business in the United States. Respondents' justification for such an assessment is the assertion that the business activities conducted in California spread beyond California and national boundaries.

Petitioner, because it has no remedy in state court, filed this action on June 25, 1981, in Federal District Court to challenge the constitutionality of the inclusion by California of its income and that of its foreign subsidiaries in the California tax base for purposes of combined apportionment. Petitioner sought a declaratory judgment that the unitary method of taxation, when applied to domestic subsidiary-foreign parent combinations, is unconstitutional under the Foreign Commerce Clause and the Due Process Clause. Petitioner also sought an appropriate injunction. The Respondents moved to dismiss this action on various jurisdictional and abstention grounds or, alternatively, to transfer this case to the Eastern District of California. Each of these issues was fully briefed and argued by the parties.

The District Court issued its first opinion on May 20, 1982 (Appendix III). It followed the reasoning of the Ninth Circuit set forth in the case of *Capitol Industries-EMI, Inc. v. Bennett*, 681 F.2d 1107 (9th Cir.), *cert. denied*, 455 U.S. 943, *on remand* 560 F. Supp. 134 (N.D.

Cal. 1982), *cert. denied*, ... U.S. ....., 75 L. Ed. 2d 435, 103 S. Ct. 1189 (1983), and held that 28 U.S.C. §1341, the Tax Injunction Act, is not applicable to bar Petitioner's action. The District Court, however, then ordered a stay, adopting the logic of the Ninth Circuit in the *Capitol Industries-EMI* case that such an order would implement the Congressional intent behind §1341.

Petitioner filed a Motion for Reconsideration on June 15, 1982. While never explicitly granting the Motion, the District Court ordered the parties to submit further briefs with respect to the unitary taxation of a multinational corporation, injunctive relief against state action and interference with state taxing authorities in light of recent decisions of this Court.

After these briefs were filed, the District Court wrote to the parties on October 14, 1982, and asked for the submission of briefs on the issue of standing. Briefs were submitted by the Respondents and Petitioner and on March 7, 1983, the District Court filed an Opinion which ordered the dismissal of Petitioner's complaint. In that Opinion (Appendix II) the District Court held that Petitioner's interest was only that of the shareholder, and therefore it lacks standing. The Court came to that conclusion because it found the unitary tax applied by the Respondents does not result in multiple taxation of Petitioner's foreign income nor result in any burden upon Petitioner's activities in foreign commerce. The District Court relied on *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425 (1980), which it concluded resolved the issue of unitary taxation applied to a unitary business with a foreign parent. The Court also held that the Petitioner's interest is only that of a shareholder. Petitioner appealed, and on June 17, 1983 the Court of Appeals for the Second Circuit sustained the District Court and adopted that Court's opinion as its own.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS THE IMPORTANT INTERNATIONAL QUESTION, REFERRED TO BUT UNDECIDED BY THIS COURT IN THE CONTAINER CASE, OF WHETHER STATE UNITARY TAXATION INVOLVING A FOREIGN PARENT CORPORATION IS AN UNCONSTITUTIONAL TAX IN VIOLATION OF THE FOREIGN COMMERCE CLAUSE.

The basic issue in this lawsuit, whether a state can apply unitary taxation to a domestic subsidiary-foreign parent combination, has been the source of significant international friction between the United States and its trading partners and has escalated to the level of exchanges between heads of state.[2]

This Court has recently rendered a number of decisions in an attempt to clarify the legal status of unitary taxation; however, the one area it explicitly excluded from consideration is the case of a domestic subsidiary-foreign parent combination. *Container Corporation of America v. Franchise Tax Board*, ... U.S. ....., 77 L. Ed. 2d 545, 103 S. Ct. 2933 (1983). This case presents that very situation and affords this Court the opportunity to resolve this important international issue now.

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2. See the letter from the Prime Minister of Canada to the President of the United States attached hereto as Appendix IV.

II. THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI TO ESTABLISH THAT A FOREIGN PARENT CHALLENGING UNITARY TAXATION IS NOT MERELY A SHAREHOLDER SEEKING REDRESS FOR WRONGS TO ITS CORPORATION.

The lower courts disposed of this case by attempting to analogize between this case and the typical case brought by a sole shareholder to redress harm suffered due to an illegal act directed at its corporation. In such a case there is no question as to the lack of standing of the sole shareholder. This legal doctrine, however, does not apply in this unique case where the injury results from the fact that the usual distinctions between corporation and shareholder have been ignored in the combined apportionment computation of the tax.

In the assessment of a unitary tax, corporate, geographic and national distinctions are ignored in computing the tax base because, according to the Respondents' theory:

> The underlying theory of formula apportionment is that because of the unitary nature of business, a dollar's profit has no readily identifiable source; the profit is derived from the operation of the business as a whole.

Supplemental Brief by Defendants on standing, October 26, 1982, at 3-4.

Moreover, the lower courts' conclusion that the unitary tax is only upon Alcancorp and that Petitioner's interest is only that of a shareholder is contradicted by Respondents' own explanation for the tax which states:

> This so-called "unitary method of taxation" requires the computation of the next [*sic*] business income of all corporations engaged in the single unitary business.

Id. at 3.

While Alcancorp receives the tax bill, Respondents' tax is not simply imposed on Alcancorp's income, but rather it is imposed on a tax base that includes the Petitioner's income. The taxing scheme apportions to California a portion of the unitary business income, which includes the income of Petitioner.

The logic of this Court's holding in *Container* contradicts the lower courts' conclusion that Petitioner is merely a shareholder challenging a local tax on a domestic subsidiary. This Court recognized in *Container* that what occurs in the unitary scheme is the worldwide apportionment of the income of a *single unitary enterprise* and that respect for formal corporate lines, the basis for the lower courts' holding on the shareholder issue, can be, and, in fact, are ignored:

> A final point that needs to be made about the unitary business concept is that it is not, so to speak, unitary. There are variations on the theme, and any number of them are logically consistent with the underlying principles motivating the approach. For example, a state might decide to respect formal corporate lines and treat the ownership of a corporate subsidiary as *per se* a passive investment. In *Mobil Oil Corp.*, however, we said that, as a general matter, such a *per se* rule is not constitutionally required.

77 L. Ed. 2d at 554-55 (citations omitted).

Thus, the lower courts' conclusion that Petitioner's interest is exclusively that of a shareholder demonstrates

a gross misunderstanding of the nature of unitary taxation as articulated by both Respondents and this Court.

The lower courts also improperly concluded that the legal incidence of the tax should be determinative as to standing. They concluded that since Alcancorp was sent the tax bill only Alcancorp should have standing to challenge the tax. However, this Court in *Container* recognized that corporate formalities involved in the legal incidence of the tax may well have less significance when the tax is imposed, as in this case, on a unitary business with a foreign parent:

> We recognize that the fact that the legal incidence of a tax falls on a corporation whose formal corporate domicile is domestic might be less significant in the case of a domestic corporation that was owned by foreign interests. We need not decide here whether such a case would require us to alter our analysis.

77 L. Ed. 2d at 572 n.32.

This case presents the opportunity for the Court to determine the significance of the legal incidence of the tax in the case of a domestic corporation owned by a foreign parent.

Finally, the lower courts ignored the burdens on the Petitioner inherent in an Alcancorp challenge of the unitary scheme. The lower courts gloss over the reality that any serious challenge to the tax depends on the direct involvement of the Petitioner regardless of the technical identity of the plaintiff. It is the details of Petitioner's operations together with its foreign subsidiaries which are the basis for the unitary treatment. Thus, the lower courts' characterization of Petitioner's relationship to this case as merely that of a shareholder ignores

the reality of the financial and administrative burdens that have become the source of international complaints.

Thus, this Court should issue a Writ of Certiorari to establish that a foreign parent is a real party in interest which has standing to challenge the unitary tax scheme, not merely a shareholder seeking redress for wrongs to its corporation.

III. THE DECISIONS OF THE LOWER COURTS WRONGFULLY DISMISSING THIS CASE ON STANDING EFFECTIVELY DECIDE THE CONSTITUTIONAL ISSUES.

A. The Lower Courts Denied Standing to Petitioner Because They Misconstrued This Court's Decision in Mobil Oil.

The lower courts mistakenly concluded that this Court had already decided in the *Mobil Oil* case that unitary taxation, as applied in the context of a foreign parent, is not a violation of the foreign commerce clause and, therefore, could create no burden on foreign commerce which would give rise to standing. The District Court stated:

> Plaintiff seeks to further bolster its argument against formula appointment by emphasizing the foreign source of the income being taxed . . . . The weakness of plaintiff's logic aside, this assertion once again ignores *Mobil Oil* which held that the foreign source of income does not preclude its taxation under the unitary method.

Appendix II, p. A10.

This interpretation is in direct conflict with this Court's decision in *Container*, where it unequivocally stated

that it has not yet addressed the constitutionality of unitary taxation in the context of a foreign parent:

> We have no need to address in this opinion the constitutionality of combined apportionment with respect to state taxation of domestic corporations with foreign parents or foreign corporations with either foreign parents or foreign subsidiaries.

77 L. Ed 2d at 568 n.26. Unlike the lower courts in this case, the *Container* opinion also distinguished *Mobil Oil* as an interstate not a foreign commerce case.

B. The Lower Courts Denied Standing to Petitioner Because They Misconstrued This Court's Decision in Japan Line.

The lower courts concede that if Petitioner had an independent claim, it would have an independent basis for standing:

> Alcan argues that the fact that its subsidiary has a remedy and standing is no reason for this Court to deny standing to itself. This would be true if the plaintiff had a valid independent basis for standing.

Appendix II, p. A8.

Petitioner has asserted a number of reasons proving its independent basis for standing: first, the taxing scheme includes all of its income in the Respondents' tax basis; second, the burdens on foreign commerce which cause the tax to be unconstitutional are burdens borne exclusively by Petitioner, since Alcancorp conducts no business in foreign commerce; third, the taxing scheme results in actual double taxation of income earned in foreign commerce by Petitioner and its foreign subsidiaries.

The lower courts rejected these arguments and held that Petitioner has no standing because they found each of Petitioner's independent bases for standing incorrect as a matter of law. They specifically held that the unitary tax is structured to apportion to California only that portion of Alcancorp's income related to its California business activity:

> In an attempt to assert standing for itself in this action plaintiff claims that the FTB has imposed a tax directly on its income. This is not so. California's unitary tax is specifically structured so as to tax a corporation proportionate to the amount of business it does within the State; the unitary tax is not a tax on non-California businesses or income.

Appendix II, p. A7.

The lower courts' refusal to give credit to Petitioner's claim that it is the object of the tax is explained by their rejection out of hand of any relevance to this case of the principles enunciated by this Court in *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979). The District Court stated, "Obviously, *Japan Line* is inapposite to the instant case." Appendix II, p. A12.

In *Japan Line* this Court recognized that the Foreign Commerce Clause was designed to prevent the states from interfering with the ability of the federal government to speak with a single voice in matters of foreign commerce. Of particular concern in the area of taxation is the risk of multiple taxation on income of foreign companies who are also subjected to taxation by the foreign countries of their commercial domicile. As the only part of the "unitary business" that finds its income and that of all of its enterprises taxed by the countries in which they operate,

and then again by California, it is Petitioner alone that feels the direct effect of double taxation; it is Petitioner alone that can demonstrate the existence of double taxation; it is the Petitioner that is the real party in interest.

The lower courts simply ignored the extensive materials attached to various of Petitioner's pleadings which demonstrated the existence of actual double taxation. They decided, in effect, that no such taxation could exist as a matter of law. This logic stands in stark contrast to this Court's recent pronouncements in the *Container* decision where this Court acknowledged that *Japan Line* was the most important case in a Foreign Commerce Clause inquiry and explicitly found that the unitary taxing scheme can result in actual double taxation of foreign entities:

> First the tax imposed here, like the tax imposed in *Japan Line*, has resulted in actual double taxation, in the sense that some of the income taxed without apportionment by foreign nations as attributable to appellant's foreign subsidiaries was also taxed by California as attributable to the state's share of the total income of the unitary business of which those subsidiaries are a part.

77 L. Ed. 2d at 567.

It is clear that the lower courts would have been compelled to grant Petitioner standing if they had recognized that unitary taxation applied to domestic subsidiary-foreign parent combinations could result in double taxation and would have accepted Petitioner's extensive evidence of actual double taxation.

C. By Misinterpreting Mobil Oil and Japan Line, the Lower Courts Have Incorrectly Decided the Constitutional Issues.

The lower courts have seriously misunderstood the relative importance of *Mobil* and *Japan Line* as applied to the domestic subsidiary-foreign parent combination. This misunderstanding has caused the lower courts to hold as a matter of law that Petitioner's interests are not affected by the California tax and thus to dismiss on the procedural issue of standing.

By mischaracterizing this case as involving the procedural issue of standing, the decision of the lower courts dismissing Petitioner's claim effectively decides the constitutional issue of unitary taxation with respect to domestic subsidiary-foreign parent combinations. The important constitutional issues of this case should be confronted directly by the courts, not evaded due to a complete misapplication of the concept of standing. A Writ of Certiorari should be granted.

IV. THIS CASE MAY PRESENT THE ONLY OPPORTUNITY FOR THIS COURT TO RULE ON THE CONSTITUTIONALITY OF APPLYING A UNITARY TAXATION SCHEME TO A DOMESTIC SUBSIDIARY OF A FOREIGN PARENT SINCE THERE IS A SERIOUS QUESTION AS TO WHETHER PETITIONER'S DOMESTIC SUBSIDIARY HAS STANDING TO RAISE A FOREIGN COMMERCE CHALLENGE IN THE STATE COURTS.

The constitutional challenge in this case focuses on improper burdens on activities in foreign commerce created by the unitary taxing scheme. Petitioner's foreign income creates the additional tax liability, and the economic

impact of the tax is exactly the same on the Petitioner as it is on its domestic subsidiary. The difference between Petitioner and its domestic subsidiary is that the domestic subsidiary is the recipient of the tax bill while the Petitioner is the exclusive object of the burden on foreign commerce.

California Code of Civil Procedure §367 provides: "Every action must be prosecuted in the name of the real party in interest . . . ." Petitioner knows of no definitive case law on this issue, but it is likely that Respondents, in the action by the domestic subsidiary in state court, will argue that since any burdens on foreign commerce are exclusively on Petitioner, the domestic subsidiary, which conducts no business in foreign commerce, is not the real party in interest to raise such a challenge.

The potential for success of such an argument by Respondents is illustrated by the fact that any effective constitutional challenge must necessarily involve Petitioner as the most active party. Only Petitioner can provide evidence as to double taxation or clarify its role and that of its foreign subsidiaries in foreign commerce. Thus any constitutional challenge, regardless of in whose name it is raised, must necessarily be managed, directed and financially supported by Petitioner. Thus, it is quite possible that Respondents could persuade the California courts that it is Petitioner rather than its domestic subsidiary that is the real party in interest as to the Foreign Commerce Clause challenge.

The view that the foreign parent is an essential party in any challenge to the unitary taxing scheme is buttressed by both the Ninth Circuit and the District Court who volunteered their view that the pivotal position of the foreign parents in the unitary taxing scheme should

equitably be reflected in an independent cause of action in the state courts:

The Ninth Circuit stated in *Capitol Industries-EMI* that:

> California, however, could eliminate both problems by clearly providing a judicial or administrative remedy in which such non-taxpaying entities, which are interested parties and have stated a claim with respect to an assessment could participate as parties. (*Such a remedy might be particularly appropriate where the state is applying the unitary assessment method to a domestic subsidiary and its foreign parent, and where the state is demanding the business records of the foreign parent.*)

681 F.2d at 1120-21 n.32 (emphasis supplied).

The District Court in the instant case stated in a similar vein:

> Perhaps the best solution to this predicament would be for California to provide a "plain, speedy and efficient" remedy for all injured parties including non-taxpayers . . . . This Court, however, is not in a position to influence the California legislature.

Appendix III, p. A23 n.9.

Another problem that must be noted is that the District Court has concluded that Petitioner's only interest is that of a shareholder, because there is allegedly no impact on foreign commerce created by including Petitioner's income in the unitary tax base.

If the California courts were to accept this reasoning, then there is no issue of foreign commerce to be raised by Petitioner's domestic subsidiary in California even if it

has standing. Thus this standing decision could effectively decide any foreign commerce issue raised by Petitioner's domestic subsidiary.

If Repondents were successful in such a defense to Alcancorp's challenge, and the lower courts' decisions in this case are allowed to stand, a "Catch-22" situation would exist where no party would be capable of making this important foreign commerce challenge. It is thus extremely important for this Court to issue a writ of certiorari and review this entire matter while all procedural options are still available.

V. THIS CASE PRESENTS THE IMPORTANT QUESTION OF WHETHER AN IMPUTED CONGRESSIONAL PURPOSE UNDERLYING THE TAX INJUNCTION ACT, 28 U.S.C. §1341, CAN BE IMPLEMENTED BY VARIOUS PROCEDURAL MECHANISMS AFTER THE STATUTE ITSELF HAS BEEN HELD INAPPLICABLE.

In the various foreign parent challenges to the California scheme of unitary taxation, various courts[3] have attempted to buttress their procedural decision by invoking the policies of the Tax Injunction Act, 28 U.S.C. §1341. The Ninth Circuit in *Capitol Industries-EMI* raised the idea that foreign parents may not have standing, to support its view that circumvention of state remedial procedures should be prevented:

> Allowing a parent corporation to bring an action in federal district court to challenge a state tax assess-

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3. In *Shell Petroleum N.V. v. Graves*, 709 F.2d 593 (1983), cited by the lower courts in this case, the Ninth Circuit invokes the policies of §1341 to support its procedural decision. The *Shell* case plaintiff, which raises issues similar to those of this case, has been granted an extension for filing its petition for a writ of certiorari to and including November 1, 1983.

> ment against its subsidiary corporation could result in the circumvention of state remedial procedures that Sec. 1341 was intended to prevent . . . . In addition, the problem of circumvention of state procedures and of simultaneous litigations can be minimized by the district court in many cases. For example, where appropriate, the district court has authority to stay a federal proceeding brought by an interested non-taxpayer, pending a determination of state administrative and judicial proceedings brought by the taxpayer. The district court also may dispose of actions brought by non-taxpayers, either before or after such a stay, where the *non-taxpayer lacks standing, is not a real-party-in-interest,* or has failed to state a claim upon which relief can be granted.

681 F.2d at 1119-1120 n.32 (emphasis added).

The District Court in this case explicitly adopted the same logic:

> As the Ninth Circuit suggested, to allow a parent corporation to bring an action in federal court to challenge an assessment of a tax on its subsidiary, is to circumvent Congress's basis for enacting the Anti-Injunction statute.

Appendix III, p. A23.

The District Court in this case explicitly followed the suggestions of the Ninth Circuit in attempting to effectuate that "policy" by first granting a stay and finally by dismissing on standing.

In *California v. Grace Brethren Church,* 457 U.S. 393 (1982), this Court made its most recent statement on §1341 and the underlying doctrine of comity. In that case this Court extensively reviewed the history and Congres-

sional policy of §1341. And yet, after doing so, this Court did not conclude that there was a Congressional policy which permitted the ban to federal jurisdiction to be implemented outside the scope of the statute. On the contrary, this Court recognized that the ban did not apply in all cases and that the still vital prerequisite to the Act's application is the availability of a remedy in the state courts. This Court also acknowledged the continuing vitality of *Hillsborough v. Cromwell*, 326 U.S. 620 (1946):

> This Court has not hesitated to declare a state refund provision inadequate to bar federal relief if the taxpayer's opportunity to raise his constitutional claims in the state proceeding is uncertain. In *Hillsborough v. Cromwell*, the taxpayer could not raise his constitutional challege in the administrative proceedings, and appeal to the state courts was discretionary with those courts. Consequently, because there [was] such uncertainty concerning the New Jersey remedy as to make it speculative, the Court held that the taxpayer could seek declaratory relief in federal court.

457 U.S. at 414 (citations omitted).

The comparison with the instant case is obvious. If this Court in *Hillsborough* had acknowledged the existence of a Congressional policy outside the statute it would have stayed the federal case pending a determination as to whether the state courts would exercise jurisdiction. Thus this Court has implicitly rejected the notion that there exists some "congressional policy" inherent in §1341 to be applied even where no state remedy exists.

This Court should issue a writ of certiorari in order to correct the substantial confusion concerning the proper application of any congressional "intent" of the Tax Injunction Act.

CONCLUSION

For the reasons stated above, this petition should be granted and the case set for argument.

Respectfully submitted,

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APPENDIX

APPENDIX I

Opinion and Order of the United States Court of Appeals for the Second Circuit

(Filed June 17, 1983)

83-7236

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals the Second Circuit, held at the United States Courthouse, City of New York, on the 17th day of June One Thousand Nine Hundred and Eighty-three.

PRESENT:

HON. ELLSWORTH A. VAN GRAAFEILAND,
HON. LAWRENCE W. PIERCE
HON. JOHN MINOR WISDOM,*
Circuit Judges

ALCAN ALUMINUM [SIC] LIMITED,
Plaintiff-Appellant.

v.

THE FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, operating through its New York Office;

*Senior Circuit Judge of the Fifth Circuit, sitting by designation.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

FRANK GOODMAN, individually and as District Manager, New York Office of the Franchise Tax Board of the State of California; and JOSEPH E. GEORGHEGAN [sic], Individually and as Supervisor - Audit Group, New York Office of the Franchise Tax Board of the State of California,

Defendants-Appellees.

ORDER

Alcan Aluminum [sic] Limited appeals from a judgment of the United States District Court for the Southern District of New York (Goettel, J.) dismissing its complaint against the Franchise Tax Board of the State of California and two of its New York office employees. We find appellant's contentions without merit and affirm substantially for the reasons stated in the opinion of the district court reported at 558 F. Supp. 624.

/s/ E. A. VAN GRAAFEILAND

/s/ L. W. PIERCE

/s/ JOHN MINOR WISDOM

APPENDIX II

Opinion of the United States District Court

(Dated March 4, 1983)

81 Civ. 3911 (GLG)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALCAN ALUMINUM [SIC] LIMITED,
Plaintiff,

-against-

THE FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, operating through its New York Office; FRANK GOODMAN, individually and as District Manager, New York Office of the Franchise Tax Board of the State of California; and JOSEPH E. GEOGHEGAN, individually and as Supervisor - Audit Group, New York Office of the Franchise Tax Board of the State of California,
Defendants.

OPINION

APPEARANCES:

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This action concerns a challenge by a foreign corporation against the tax treatment accorded its United States subsidiary by a state taxing authority. The following opinion grows out of an earlier one in which we decided to stay the action and postpone consideration of the substantive issues involved in light of cases then pending before the California courts and the United States Supreme Court. *Alcan Aluminum* [sic] *Limited v. The Franchise Tax Board of the State of California*, 539 F. Supp. 512 (1982). In this opinion, we address the issue of whether plaintiff has standing to bring this action. For the reasons elaborated below, we conclude that it does not.

Plaintiff here is Alcan Aluminum [sic] Limited (Alcan), a Canadian Corporation. The defendants are the Franchise Tax Board of the State of California (FTB) and several of its employees. In this action, plaintiff is challenging the tax treatment that the FTB has accorded its wholly owned American subsidiary, Alcan Aluminum Corporation (Alcancorp).[1] Specifically, Alcan is attacking the

use of California's unitary taxation method to determine its subsidiary's tax liability. Under this scheme, the separate identities of corporate family members are disregarded and all of a corporation's activities in a particular area are consolidated into a single unitary line of business to determine the net income of that business. *Max Factor & Co. v. Franchise Tax Board of California*, 35 Cal. App. 3d 7, 9, 110 Cal. Rptr. 536, 537 (1973). Once this figure is ascertained, the percentages of the business entity's sales, property, and payroll within California are averaged. The previously determined net income is then multiplied by this average percentage to arrive at the corporation's tax liability. *See* Cal. Rev. & Tax Code §§ 25101, 25102, 25128-25136 (West 1979).

Plaintiff has brought this action to challenge the use of its income in determining the net income of its subsidiary. The FTB justifies this inclusion on the ground that Alcancorp and plaintiff's other subsidiaries are engaged in a unitary business, and that unitary taxation is proper "[w]hen the income of the taxpayer . . . is derived from or attributable to sources both within and without the state." Cal. Rev. & Tax Code § 25101 (West 1979). Alcan objects to this global application of unitary taxation on the ground that it is unconstitutional.[2]

The defendants named in this action are the FTB, operating through its New York office, and a number of its representatives, acting as both individuals and as employees of the organization.[3] After this action was brought, defendants subsequently moved to have it dismissed on a number of grounds pursuant to Fed. R. Civ. P. 12(b). Of these various grounds, the only one we consider here is the issue of plaintiff's standing to bring this action. After careful deliberation, we have concluded that plaintiff does not have such standing.

Crucial to an understanding of this action is the federal Anti-Injunction Statute, which provides that "[t]he district courts shall not enjoin, suspend, or restrain the assessment, levy, or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341 (1976). Defendants argue that this statute bars Alcan's action before this court because Alcan already has a "plain, speedy, and efficient" remedy in the form of its subsidiary's action now pending before the California courts. Defendants argue further that plaintiff is free to bring an action before the California courts itself. Plaintiff responds that its subsidiary has no standing to raise certain constitutional claims which it (Alcan) is raising before this Court.[4] Further, Alcan claims that it has no standing before the California courts because it is not a California taxpayer and California's remedy is available only to taxpayers.

In our earlier opinion in this action, we followed the Ninth Circuit in holding that a non-taxpaying foreign parent corporation is not barred by section 1341 from maintaining an action in federal court merely because a "plain, speedy and efficient" remedy is available to its domestic taxpaying subsidiary. *Alcan Aluminum* [sic], *supra*, 539 F. Supp. at 514-15 (citation omitted).[5] Today, we decide that despite the availability of the Anti-Injunction Statute to this type of plaintiff, Alcan nevertheless lacks standing to sue in this action.

In setting forth certain requirements for standing, the Supreme Court has held that

> No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies. See *Flast v. Cohen*, 392 U.S. 83, 95 (1968). The concept of standing is part

> of this limitation. Unlike other associated doctrines, for example, that which restrains federal courts from deciding political questions, standing 'focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated.' *Id.*, at 99. As we reiterated last Term, the standing question in its Art. III aspect 'is whether the plaintiff has "alleged such a personal stake in the controversy" as to warrant *his* invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf.' *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975) (emphasis in original). In sum, when a plaintiff's standing is brought into issue, the relevant inquiry is whether, assuming justiciability of the claim, the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision. Absent such a showing, exercise of its power by a federal court would be gratuitous and thus inconsistent with the Art. III limitation."

Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 37-38 (1976).[6] Consistently, the courts have required that plaintiffs demonstrate a "distinct and palpable injury" to themselves in order to acquire standing. *Warth v. Seldin, supra*, 422 U.S. at 501.

In an attempt to assert standing for itself in this action, plaintiff claims that the FTB has imposed a tax directly on its income. This is not so. California's unitary tax is specifically structured so as to tax a corporation proportionate to the amount of business it does within the State; the unitary method is not a tax on non-California businesses or income. Because the profits of a unitary business "arise from the operation of the business as a whole, it becomes misleading to characterize the income of the business as having a single identifiable

'source.'" *Mobil Oil Company v. Commissioner of Taxation*, 445 U.S. 425, 438 (1980). The Supreme Court there recognized such unitary schemes to be a valid method of corporate taxation. *See also ASARCO, Inc. v. Idaho State Tax Commission*, 102 S. Ct. 3103, 3109-10 (1982) and *F.W. Woolworth Co. v. Taxation & Revenue Dept.*, 102 S. Ct. 3128, 3134 (1982). Thus, plaintiff's claim of a direct tax upon itself is invalid and Alcan has no "distinct and palpable injury" on which to base a claim of standing *Warth v. Seldin, supra*, 422 U.S. at 501.

Alcan argues that the fact that its subsidiary has a remedy and standing is no reason for this Court to deny standing to itself. This would be true if plaintiff had a valid independent basis for standing. *See Schaffer v. Universal Rundle Corp.*, 397 F.2d 893, 896 (5th Cir. 1968). *See also Mullins v. The First National Bank of Virginia*, 275 F. Supp. 712, 721-22 (W.D. Va. 1967). But despite vigorous assertions to the contrary, plaintiff does not have such an independent claim. Once again, Alcan's unsubstantiated allegation of a direct tax upon itself is an insufficient basis for standing. While plaintiff cites a variety of cases giving stockholders a right to sue independently of the corporation when the corporation has been wronged, none of this authority applies to the instant case.[7] In all of these cases, the stockholder was accorded standing on the ground that "the wrong itself amount[ed] to a breach of duty owed to the stockholder personally." *Schaffer, supra*, 397 F.2d at 896. Moreover, it is clear that a mere fluctuation in the value of a corporation's stock or the size of its dividends will not suffice to give a stockholder an independent cause of action.[8] As the *Schaffer* court went on to explain,

> 'And it is universal that where the business or property allegedly interfered with by forbidden practices

> is that being done and carried on by a corporation, it is that corporation alone, and not its stockholders (few or many), officers, directors, creditors or licensors, who has a right of recovery, even though in an economic sense real harm may well be sustained as the impact of such wrongful acts bring about reduced earnings, lower salaries, bonuses, injury to general business reputation, or diminution in the value of ownership.'

Id. at 896, citing *Martens v. Barrett*, 245 F.2d 844, 846 (5th Cir. 1956). As plaintiff has failed to show any "independent duty" owed to it by defendant FTB, it has no grounds for standing.[9]

As mentioned above, the Supreme Court has repeatedly recognized the validity of formula apportionment in unitary taxation. Plaintiff seeks to circumvent this recognition by advocating the use of separate accounting. The Supreme Court, however, has already discredited this means of attacking formula apportionment in *Mobil Oil Company v. Commissioner of Taxation*, *supra*, 445 U.S. at 425.[10] In that case, a company sought to avoid taxation under a formula similar to California's by challenging a state's ability to tax income earned outside its borders. The Court replied to this challenge in no uncertain terms:

> The argument that the source of the income precludes its taxability runs contrary to precedent. In the past, apportionability often has been challenged by the contention that income earned in one State may not be taxed in another if the source of the income may be ascertained by separate geographical accounting. The Court has rejected that contention so long as the intrastate and extra-state activities formed part of a single unitary business. See *Butler Bros. v. McColgan*, 315

U.S. 501, 506-508 (1942); *Ford Motor Co. v. Beauchamp*, 308 U.S. 331, 336 (1939); *cf. Moorman Mfg. Co. v. Bair*, 437 U.S., at 272. In these circumstances, the Court has noted that separate accounting, while it purports to isolate portions of income received in various States, may fail to account for contributions to income resulting from functional integration, centralization of management, and economies of scale. *Butler Bros. v. McColgan*, 315 U.S., at 508-509. Because these factors of profitability arise from the operation of the business as a whole, it becomes misleading to characterize the income of the business as having a single identifiable 'source.' Although separate geographical accounting may be useful for internal auditing, for purposes of state taxation it is not constitutionally required. *Id.* at 438.

Plaintiff seeks to further bolster its argument against formula apportionment by emphasizing the foreign source of the income being taxed. In a strained syllogism, plaintiff argues that a) unitary taxation is a tax on foreign commerce, b) Alcancorp engages in no foreign commerce, so c) the tax must be upon Alcan rather than its subsidiary. As previously demonstrated, the unitary tax is imposed *neither* upon foreign commerce *nor* upon Alcan itself. The weakness of plaintiff's logic aside, this assertion once again ignores *Mobil Oil*, which held that the foreign source of income does not preclude its taxation under the unitary method. *Id.* at 438.

In addition to the previously cited authority on unitary taxation, several decisions have recently been handed down in the Ninth Circuit concerning cases with factual situations strikingly similar to the instant one. Plaintiff maintains that these cases do not undermine its position, but it is once again incorrect. *Shell Petroleum N.V. v. Mary*

Ann Graves et al., No. C-81-4302 (N.D. Cal. Aug. 4, 1982), concerned a foreign parent's challenge against the taxation of its domestic subsidiaries under California's method of formula apportionment. In that case, the Court made it clear that the plaintiff, whose position was almost identical to Alcan's here, had no standing. "It does not appear," the court observed, "that the constitutional provisions alleged to have been violated by the imposition of this method of taxation or by the Board's alleged informational demands specifically vest rights in or create any right of action in favor of, the shareholders as shareholders, apart from those of the corporation." *Id.*, slip op. at 9. Plaintiff makes the same claim regarding *EMI Ltd. v. William M. Bennett*, No. C-79-2146 (N.D. Cal. Oct. 8, 1982), another case similar to the instant one in which the court held that the plaintiff had no standing. We agree with the Northern District of California in holding that a plaintiff such as the one before us has no standing.[11] Alcan seeks to distinguish its own position from those of the plaintiffs in *Shell* and *EMI* by alleging that a tax is being assessed directly upon it. In *Shell* and *EMI* by contrast, the plaintiffs made no such claim, instead challenging the tax only insofar as it applied to their subsidiaries. As previously mentioned, plaintiff's claim of a tax imposed directly upon itself is groundless. Once again, the mere assertion of a groundless claim is not sufficient to confer standing upon the claimant.

Finally, plaintiff relies heavily on *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1978) in a further attempt to establish standing. That case concerned a property tax imposed by a local government on shipping containers owned, based, and registered abroad. The Supreme Court specifically limited its holding in *Japan Line* to the narrow issue of "whether instrumentalities of com-

merce that are owned, based, and registered abroad and that are used exclusively in international commerce, may be subjected to apportioned ad valorem property taxation by a State." 441 U.S. 444. Obviously, *Japan Line* is inapposite to the instant case. Here, there are no "instrumentalities of commerce" present, and the assessment at issue is an income tax rather than an ad valorem property tax. Thus, *Japan Line* has no bearing on the instant case.

For all of the above reasons, we hold that plaintiff has no standing. It is therefore ordered that the action be dismissed.

SO ORDERED.

Dated: New York, New York
March 4, 1983

/s/ GERARD L. GOETTEL
U.S.D.J.

FOOTNOTES

1. Alcancorp is a New York corporation, qualified to do business in California, with its principal place of business in Ohio.

2. After paying the tax as assessed, Alcancorp proceeded to seek a refund in the California courts. The basic premise of that refund action is that Alcancorp and Alcan's foreign subsidiaries are not involved in a unitary business taxable by California on a worldwide scale. Although some constitutional issues are raised in the California refund action, no injunctive or declaratory relief is sought there. In this action, by contrast, Alcan is seeking primarily declaratory and injunctive relief through constitutional claims.

3. These individuals are Frank Goodman, District Manager of the FTB's New York office, and Joseph E. Geoghegan, Supervisor of the Audit Group in the New York office.

As we noted in our earlier opinion,

> [d]efendants have suggested that the proper responsible parties have not been named as individual defendants in this action. Apparently, the plaintiff has intentionally brought suit against certain local FTB employees, instead of the FTB board members, to establish venue in New York. If the board members were the defendants in this action, venue would not lie in this district because California is where the board members reside and have their official duty stations, and it is the place in which the actions giving rise to these claims occurred. 28 U.S.C. 1391(b) (1976). *Alcan Aluminum* [sic], *supra*, at 514 n. 2.

4. Specifically, plaintiff argues that the state forum is not available to either itself or its subsidiary for claims relating to the foreign commerce clause.

5. At the same time, we expressed serious reservations as to whether the parent's and subsidiary's respective interests were not so similar that the subsidiary's action would determine the claims of both parties. *Alcan Aluminum* [sic], *supra*, at 514.

It should also be noted that in hearing *EMI* on remand, the Northern District of California decided that the plaintiff, who occupied a position very similar to Alcan's in the instant case, had no standing. *EMI Limited v. William M. Bennett et al.*, No. 79-2146 (N.D. Cal. Oct. 8, 1982).

6. In *Eastern Kentucky*, a group of low-income individuals and their representative organizations challenged an IRS decision granting favorable tax treatment to various hospitals. Plaintiffs argued that the hospitals should have been denied this treatment because they did not serve indigent patients to the full extent of their (the hospitals') financial abilities. Ruling that the plaintiffs had not shown sufficient injury to themselves, the Court declined to grant them standing. While the Court specifically denied ever reaching the issue of whether a third party may

ever challenge IRS treatment of another party, *Eastern Kentucky*, *supra*, 425 U.S., at 37, the logical implication was that such a challenge should never be allowed. Indeed, as Justice Stewart noted in his concurring opinion,

> I add only that I cannot now imagine a case, at least outside the First Amendment area, where a person whose own tax liability was not affected ever could have standing to litigate the federal tax liability of someone else. *Id.* at 46.

7. Alcan acknowledges implicitly that its status as sole shareholder of Alcancorp is insufficient by itself to confer standing to redress a harm done to the corporation. Plaintiff's Memorandum on Standing at 3.

8. Plaintiff alleges that under *American Power & Light Co. v. S.E.C.*, 325 U.S. 385 (1945), "a sole shareholder can have an independent basis for standing, even when its *only injury* is a reduction in its expectation of dividends, if it is clear that the comparative effects of the injury as between the corporation and the shareholder are such that the effect on the corporation is not as adverse as the effect on the shareholder . . ." Plaintiff's Memorandum on Standing at 6-7 (emphasis in original). Plaintiff neglects to point out, however, that this case concerned a statute that specifically granted standing to parties who would not otherwise have had it. 325 U.S. at 389-91. *American Power* has no bearing on the instant case, in which no such statute exists.

9. Alcan might have standing limited to the issue of information demanded from its subsidiary that it must provide, but such standing would be restricted to that specific matter. Even then, such standing might well depend on whether the information was demanded directly of Alcan or indirectly through its subsidiary. This suggestion has already been made by another court in a similar factual situation. *EMI Limited v. William M. Bennett*, 560 F. Supp. 134 (N.D. Cal. 1982).

10. Amazingly, plaintiff does not cite this key case once in its memorandum on standing. This glaring omission, in addition to numerous quotations out of context, does little to support the overall credibility of plaintiff's argument.

11. It should be noted that in both *Shell* and *EMI*, the plaintiffs brought their respective actions in California, the site of the allegedly illegal taxation.

APPENDIX III

Opinion of the United States District Court

(Dated May 20, 1982)

81 Civ. 3911 (GLG)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALCAN ALUMINIUM LIMITED,
Plaintiff,

-against-

THE FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, operating through its New York Office; FRANK GOODMAN, individually and as District Manager, New York Office of the Franchise Tax Board of the State of California; and JOSEPH E. GEOGHEGAN, individually and as Supervisor - Audit Group, New York Office of the Franchise Tax Board of the State of California,
Defendants.

OPINION

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GOETTEL, *D. J.*:

This action by Alcan Aluminium, Ltd. (Alcan), a Canadian corporation, challenges the California Franchise Tax Board's (FTB) inclusion of income from non-United States corporations in its calculation of unitary corporate income tax. California's method of unitary taxation does not consider the separate identities of members of a corporate family. *Max Factor & Co. v. Franchise Tax Board of California*, 35 Cal. App. 3d 7, 9, 110 Cal. Rptr. 536, 537 (1973). Rather, it consolidates the companies' activities in a line of business into a single unitary business and calculates the tax payable to California in a two step process. First, the percentages of a single unitary business entity's sales, property, and payroll that are in California are averaged. Second, the average percentage is multiplied by the total income from the single unitary business that the company conducts. *See* Cal. Rev. & Tax Code §§ 25101, 25102, 25128-25136 (West 1979).

The FTB levied the unitary tax on plaintiff's indirectly wholly owned subsidiary Alcan Aluminum Corporation (Alcancorp).[1] In computing Alcancorp's taxable income, the FTB included the payroll, sales, property, and income of Alcan's subsidiaries that are foreign corporations having no business or contacts in the United States. According to the FTB, this computation is proper because Alcancorp and these subsidiaries are engaged in a unitary business, and unitary taxation is appropriate "[w]hen the income of the taxpayer . . . is derived from or attributable to sources both within and without the state." Cal. Rev. & Tax Code § 25101 (West 1979). Alcan insists that a worldwide application of unitary taxation is unconstitutional, especially when the domestic subsidiary deals with the foreign parent corporation and the foreign subsidiaries at arms' length, if at all. Alcan has demonstrated that in years when its United States operations showed a loss and its foreign operations showed profits, it has nevertheless paid California income tax.

Alcancorp has paid the tax as assessed and is seeking a refund in the California courts through procedures available to it as a California taxpayer. The primary theory underlying the refund action is that Alcancorp and Alcan's foreign subsidiaries are not involved in a unitary business taxable by California on a worldwide scale. (Although injunctive and declaratory relief are not sought in the California refund action, some constitutional issues are raised.) In the action before this Court, the foreign parent corporation is raising constitutional claims and primarily seeking declaratory and injunctive relief.

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1. Alcancorp is a New York corporation, qualified to do business in California, with its principal place of business in Ohio.

The defendants named in this action are the FTB, operating through its New York office, Frank Goodman, individually and as District Manager of the New York office, and Joseph E. Geoghegan, individually and as Supervisor of the Audit Group, New York office.[2] They have now moved to dismiss this action pursuant to Fed. R. Civ. P. 12(b) on the grounds that the Court lacks subject matter jurisdiction, that there is an identical action brought by plaintiff's subsidiary pending before the California courts, that venue is improper, and that the complaint fails to state a claim upon which relief can be granted. In the alternative, the defendants ask this Court to abstain from exercising its jurisdiction or to transfer the case,[3] in the interests of justice, to the Eastern District of California, where it could have been brought originally. *See* 28 U.S.C. §§ 1404(a), 1406(a) (1976).[4] These arguments will be considered seriatim.

The defendants' argument concerning subject matter jurisdiction is based on the Anti-Injunction Statute, which provides that "[t]he district courts shall not enjoin, suspend, or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient

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2. Defendants have suggested that the proper responsible parties have not been named as individual defendants in this action. Apparently, the plaintiff has intentionally brought suit against certain local FTB employees, instead of the FTB board members, to establish venue in New York. If the board members were the defendants in this action, venue would not lie in this district because California is where the board members reside and have their official duty stations, and it is the place in which the actions giving rise to these claims occurred. 28 U.S.C. 1391(b) (1976).

3. *See supra* note 2.

4. This alternative, while resisted strenuously by the plaintiff, is not forcefully pressed by the defendants, who apparently prefer the other remedies sought. In any event, the defendants' papers do not contain adequate information to decide that aspect of this motion.

remedy may be had in the courts of such State." 28 U.S.C. § 1341 (1976). The defendants argue that this statute bars a decision on this matter of state taxation because California's "plain, speedy and efficient" remedy is available to plaintiff through its subsidiary's identical action before the California courts. Alcan's response is that not only are the claims in the state and federal actions different, but the state forum is not available to either plaintiff or its subsidiary for constitutional claims relating to the Foreign Commerce Clause. U.S. Const. art. I, § 8. Specifically, it argues that its domestic subsidiary is not engaged in foreign commerce and, therefore, has no standing to raise these constitutional issues of multiple taxation of the instrumentalities of foreign commerce and interference with the exclusive federal jurisdiction over foreign commerce. Further, Alcan argues that it has no standing to raise these issues in the California courts because, although its income and that of its non-American subsidiaries is considered for purposes of computing Alcancorp's taxes, Alcan is not the actual taxpayer and California's remedy is available only to taxpayers.

The Ninth Circuit recently addressed the issue of whether a foreign parent corporation, which is not a taxpayer, is barred by section 1341 from maintaining an action in federal court because a "plain, speedy and efficient" remedy is available to its domestic taxpaying subsidiary. In *Capitol Industries-EMI, Inc. v. Bennett*, No. 80-4113 (9th Cir. Feb. 16, 1982), a case involving issues strikingly similar to those before this Court, the court held that section 1341 did not bar the exercise of subject matter jurisdiction because, although the claims of foreign parent and domestic subsidiary corporations were substantially the same, the interests were not necessarily identical. Thus, it found that the state courts did not provide a remedy to the foreign

parent corporation. *Capitol Industries-EMI, Inc. v. Bennett, supra,* slip op. at 10-12. Although this Court questions whether the parent and subsidiary's interests are not so similar that the subsidiary's action would determine the claims of both parties, we will follow the Ninth Circuit in holding that section 1341 does not bar the plaintiff's claim. As California is in the Ninth Circuit, that Court is in a better position to decide this issue of state law, that is, the availability of the state remedy to the parent corporation. *Factors Etc., Inc. v. Pro Arts, Inc.,* 652 F.2d 278, 283 (2d Cir. 1981) (federal courts in other circuits should defer to the pertinent circuit's holdings on first impression questions of law).

The defendants' second argument is that this action must be dismissed because the Eleventh Amendment bars federal courts from hearing suits "commenced or prosecuted against one of the United States." U.S. Const. amend. XI. In *Capitol Industries,* however, the Ninth Circuit held that the Eleventh Amendment does not bar federal court actions against state officials to enjoin them from enforcing unconstitutional statutes. *Capitol Industries-EMI, Inc. v. Bennett, supra,* slip op. at 12; *see also Larson v. Domestic and Foreign Commerce Corp.,* 337 U.S. 682, 689-90 (1949); *United States Steel Corp. v. Multistate Tax Commission,* 367 F. Supp. 107, 112-15 (S.D.N.Y. 1973). This Court agrees with the Ninth Circuit and holds that the Eleventh Amendment does not bar plaintiff's claim.

Defendants' third point is that governmental immunity shields the individual defendants from any liability for discretionary acts performed in their official capacity. In support of this proposition, however, defendants have cited authority that may provide a shield from damages, but not from injunctive or declaratory relief. In this action,

plaintiff primarily seeks declaratory and injunctive relief, which is not barred by the case law or the California constitution or statutes cited by defendants.

The defendants' fourth argument is that plaintiff lacks the requisite injury to have standing. First, they argue that Alcan's relation to Alcancorp is that of a shareholder and that such a relationship gives Alcan merely an expectancy interest in Alcancorp's corporate earnings, not a property interest. Thus, they conclude that plaintiff has no standing because the speculative nature of its interest precludes Alcan from showing injury. Second, they argue that Alcan has not received the requisite direct and substantial injury to have standing because Alcan was not the taxpayer. Plaintiff responds that it has two direct injuries, namely, multiple taxation in violation of the Foreign Commerce Clause and a diminished ownership interest in Alcancorp.[5] *Capitol Industries* offers no specific guidance on standing. *See Capitol Industries-EMI, Inc. v. Bennett, supra,* slip op. at 11 n.31. Although plaintiff's claims of standing appear tenuous, this Court does not dismiss the case on that issue at this time and it need not now be decided in light of the steps provided hereinafter for resolution of the substantive issues.

Defendants' final contention is that this Court should abstain from exercising its jurisdiction. According to the defendants, absent a patently invalid statute, abstention is proper when the dispute involves restraint of state tax collection. *See Colorado River Water Conservation District v. United States,* 424 U.S. 800, 816 (1976). The Ninth Circuit stated in *Capitol Industries* that because the foreign parent corporation was found not to have an adequate rem-

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5. Alcan argues that because it is the sole shareholder of Alcancorp, its interest is not the expectancy interest of an ordinary shareholder, but an ownership interest.

edy in state court, it would be inappropriate to abstain should abstention result in dismissal. *Capitol Industries-EMI, Inc. v. Bennett, supra,* slip op. at 13 n.34. It did note, however, that a stay pending decision by the highest state court might be appropriate in light of the fact that it was unclear how the highest California court would rule on the issue of whether unitary taxation encompasses the overseas operations of United States corporation. *Id.* at 13 n.34.

A stay is particularly appropriate in the case at bar. First, the issues involve uncertainty as to interpretation of state law and its constitutionality. Second, several domestic corporations are already seeking review of the FTB's method of assessing income taxes on the worldwide unitary method by the Supreme Court of the United States or the highest court of California. *See, e.g., Container Corp of America v. Franchise Tax Board,* 117 Cal. App. 3d 988, 173 Cal. Rptr. 121 (1981); *Anaconda v. Franchise Tax Board of California,* No. 1-48666 (Ct. App. March 24, 1982); *Firestone Tire & Rubber Co. v. Franchise Tax Board of California,* No. 2-62918 (Ct. App., filed 1981); *Caterpillar Tractor Co. v. Lenkos,* 84 Ill. 2d 102, 417 N.E.2d 1343, *cert. granted sub nom. Chicago Bridge & Iron Co. v. Caterpillar Tractor Co.,* 102 S.Ct. 564 (1981). Final decisions in these cases, followed by the state court's decision on Alcancorp's case,[6] may render plaintiff's substantive claims moot.[7]

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6. Alcancorp's state action is presently inactive, awaiting the determination of other cases raising similar issues that were already on appeal, but there is no known impediment to the reactivation of the case.

7. This Court recognizes that plaintiff's claims are not those of a domestic corporation and that the pending actions would render plaintiff's claims moot only if the Supreme Court of the United States or the highest California court forbade the worldwide taxation of overseas domestic operations. If those courts

(Continued on following page)

Finally, staying this action pending resolution of Alcancorp's case before the state court[8] furthers the Congressional purpose in enacting the Anti-Injunction Statute, 28 U.S.C. § 1341 (1976). One reason that Congress enacted the statute was to prevent out-of-state corporations from having access to state and federal courts while limiting domestic corporations to state courts. *See Aluminum Co. of America v. Dep't of Treasury of Mich.*, 522 F.2d 1120, 1123-24 (6th Cir. 1975); S. Rep. No. 1035, 75th Cong., 1st Sess. 1-2 (1937). As the Ninth Circuit suggested, to allow a parent corporation to bring an action in federal court to challenge the assessment of a tax on its subsidiary, is to circumvent Congress's basis for enacting the anti-injunction statute. *Capitol Industries-EMI, Inc. v. Bennett, supra*, slip op. at 12 n.32. If this Court denied plaintiff access to the federal courts, however, plaintiff would, under the reasoning of *Capital Industries*, have no forum because the California remedy is not available to nontaxpayers.[9] In light of these considerations and the fact that plaintiff would suffer no imminent harm by postponement of a decision on the merits, it is both unnecessary and unwise

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Footnote continued—

rendered any other decision, plaintiff's substantive questions about the propriety of state taxation affecting foreign corporations in the manner that Alcan is affected would warrant close consideration in the proper forum, assuming plaintiff shows standing. *See Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979) (California's ad valorem property taxation of crates of a Japanese shipping company handled in California is unconstitutional on grounds that the tax interfered with the exclusive federal authority to affect foreign commerce).

8. *See supra* note 6.

9. Perhaps the best solution to this predicament would be for California to provide a "plain, speedy and efficient" remedy for all injured parties including nontaxpayers. *Capitol Industries-EMI, Inc. v. Bennett, supra*, slip op. at 12 n.32. This Court, however, is not in a position to influence the California legislature.

for this Court to decide plaintiff's substantive questions at this time.

Thus, this action is stayed pending a disposition of the issues concerning the FTB's worldwide unitary taxation method in Alcancorp's case in state court, or in other cases before the highest California court or the Supreme Court of the United States.[10] The Clerk will place this action on the suspense calendar pending further direction from this Court.

SO ORDERED.

DATED: New York, N.Y.
May 20, 1982

/s/ GERARD L. GOETTEL
U.S.D.J.

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10. In light of this determination, the Court defers decision of some of the other issues raised, such as whether plaintiff has standing, whether the correct defendants have been sued, Cal. Gov't Code § 15700 (West 1980), and whether the venue is proper and convenient. 28 U.S.C. §§ 1404(a) and 1406(a) (1976).

APPENDIX IV

Letter, September 24, 1983, Prime Minister Pierre Trudeau to President Ronald Reagan

PRIME MINISTER — PREMIER MINISTRE

Ottawa, K1A OA2

September 24, 1983

Dear Ron,

I am writing to you to express the Canadian government's serious concern about the unitary tax issue which I understand you are now considering.

This method of taxation which permits individual state governments to levy taxes against the world-wide earnings of multinational corporations is, in our view, undesirable. In many cases, it places international enterprises in the position of having to pay tax in one jurisdiction for profits earned (and taxed) elsewhere.

The recent Supreme Court decision in the case of Container Corporation vs the California State Franchise Tax Board has considerably heightened the Canadian government's concerns. In addition to the serious potential for double taxation and the increased administrative costs for business, there is the danger that other states and countries, more occupied with a need for increased tax revenues than with consistent tax standards, may adopt this method.

I realize that the issues involved here are not simple, but I am concerned that this could become a major stumbling block to international business and have an effect on our bilateral economic relations. Accordingly, I would

strongly encourage your decision to be one that would lead to a curtailing of this practice.

Yours sincerely,

/s/ Pierre

The Honourable Ronald Reagan
President of the United States of America
The White House
Washington, D.C.

Office - Supreme Court, U.S.
FILED
NOV 25 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-638

In The

Supreme Court of the United States

October Term, 1983

ALCAN ALUMINIUM LIMITED,

Plaintiff, Appellant and Petitioner,

vs.

THE FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, Operating Through Its New York Office; FRANK GOODMAN, Individually, and as District Manager, New York Office of the Franchise Tax Board of the State of California; and JOSEPH E. GEOGHEGAN, Individually, and as Supervisor-Audit Group, New York Office of the Franchise Tax Board of the State of California,

Defendants, Appellees and Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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Attorney General
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QUESTION PRESENTED

Whether petitioner has standing under article III of the Constitution to bring this action.

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No. 83-638

In The

Supreme Court of the United States

October Term, 1983

ALCAN ALUMINIUM LIMITED,

Plaintiff, Appellant and Petitioner,

vs.

THE FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, Operating Through Its New York Office; FRANK GOODMAN, Individually, and as District Manager, New York Office of the Franchise Tax Board of the State of California; and JOSEPH E. GEOGHEGAN, Individually, and as Supervisor-Audit Group, New York Office of the Franchise Tax Board of the State of California,

Defendants, Appellees and Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

JURISDICTION

The technical jurisdictional requirements appear to be set forth adequately in the petition except that petitioner has failed to establish its standing to sue. It also should be observed that contentions similar to petitioner's were rejected by the United States District Court for the Northern District of California and affirmed by the United States Court of Appeals for the Ninth Circuit in *Shell Petroleum N. V. v. Graves* (1983), 709 F. 2d 593, based

upon and in conformity with the pertinent decisions of this Court and the federal courts.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, article III, section 3 (standing of plaintiff).

STATEMENT OF THE CASE

A. Prefatory Statement

In its extensive statement of the case, petitioner has failed to point out a crucial fact, namely, that petitioner's wholly owned California subsidiary (Alcan Aluminium Corporation, hereafter referred to as "ALCANCORP") has filed in the California Superior Court a suit for refund of the same taxes which petitioner is attacking in this action. The California action is pending before the California court at this very moment. A decision favorable to ALCANCORP in that case will avoid the constitutional questions raised here by petitioner.

B. Facts

Since petitioner has set forth some of the facts in an argumentative rather than factual context and since its recitation of the facts is incomplete, we will restate the principal facts.

1. *Background Facts*

a. Petitioner is a Canadian corporation which does no business in the United States and has paid no taxes to the State of California.

b. Petitioner is the parent of ALCANCORP, which does business in the United States, including California.

c. Respondents, hereafter referred to collectively as FTB, is the agency of the State of California administering the income and franchise tax laws of that state.

d. Petitioner and ALCANCORP are two completely separate and independent legal entities.

e. FTB has not or even attempted to tax petitioner; nor has the FTB taken or even sought to take any action of any type whatsoever against petitioner.

f. State of California, through the FTB, assessed additional franchise taxes based on the unitary method upon ALCANCORP.

g. The United States Supreme Court has consistently held that the states may impose an apportioned tax on the unitary method upon the income of a corporation doing business in more than one state or nation. (*Container Corporation of America v. Franchise Tax Board* (1983) — U. S. — [77 L. Ed. 2d 545, 103 S. Ct. 2933].)

h. On or about April 14, 1977, ALCANCORP filed in the Los Angeles County Superior Court (California) a suit against the FTB for refund of taxes assessed against ALCANCORP on the unitary method. The suit

is known as *Alcan Aluminium Corporation v. Franchise Tax Board,* Los Angeles Superior Court No. C 196604. This case is still pending, having been held in abeyance awaiting the outcome of the *Container* decision.

2. *Relief Sought In Instant Lawsuit*

On June 25, 1981, petitioner filed this action in the federal district court seeking a variety of relief; namely,

a. First Claim—Appears to seek injunctive relief.

b. Second Claim—Seeks a declaration that the application of the unitary method of taxation upon ALCANCORP is unlawful and it violates the constitution, laws and treaties of the United States.

c. Third Claim—Appears to request that a refund be made to petitioner of taxes that had been paid by ALCANCORP.

d. Fourth Claim—Appears to claim that taxation of ALCANCORP has resulted in petitioner being deprived of its property without due process.

e. Special Claim—Seeks payment of attorney's fees under 42 United States Code section 1988.

3. *Position Taken In The Court of Appeals*

Petitioner conceded the constitutionality of the unitary method of taxing domestic corporations. Petitioner went on to state that it "makes no claim, for instance, that principles of interstate commerce are violated by apportioning income from other states, or that appellees' manner of calculating the apportioned income violates prin-

ciples of due process." (Petitioner's App. Br., Court of Appeals, p. 8.)

Petitioner further asserted that "this Court is asked to make a determination as to whether, under the distinct circumstances of the instant case, the assessment of the tax [against ALCANCORP] is constitutional." (*Id.*, at p. 17.)

Petitioner also referred to some government correspondence from the prior federal administration and the compilation of various statistics (*id.* at pp. 17-18) and stated that "[T]he conclusion that appellees' taxing scheme burdens foreign commerce, and therefore, burdens appellant's activities exclusively in foreign commerce is inescapable and this Court should squarely hold that appellees' tax is an unconstitutional tax burden on appellant's activities in foreign commerce, and appellant therefore has standing to challenge appellees [sic] unitary tax measure." (*Id.* at p. 29.)

ARGUMENT

I.

Petitioner Has No Standing Under Article III of the United States Constitution

A. Introduction

The essence of petitioner's action is found in its allegation that the FTB has unlawfully sought to assess additional taxes against ALCANCORP on the unitary method.

Petitioner does not quarrel with FTB's requiring ALCANCORP to file a combined report on a military basis with respect to ALCANCORP and its United States subsidiaries. But in an effort to prevent FTB from lawfully including the unitary portion of petitioner's income and factors in the tax formula to determine the amount of ALCANCORP's income which is properly apportionable to California under the unitary method, petitioner filed the instant action for injunctive and declaratory relief prior to ALCANCORP's proceeding with its California suit for refund.

B. In Container This Court Does Not State That A Nontaxpaying Foreign Parent Has Standing To Challenge California's Tax

In *Container*, this Court clearly did not state that a nontaxpaying foreign parent has standing to challenge a state's tax imposed on a foreign parent's United States subsidiary. However, petitioner relies on two statements that this Court made in *Container* to support its strained contention for standing. In the first of these two, this Court said in a note that:

> "We have no need to address in this opinion the constitutionality of combined apportionment with respect to state taxation of domestic corporations with foreign parents. . . ." (*Container*, 103 S. Ct. at 2952, n. 26.)

This statement refers to the state taxation of domestic corporations with a foreign parent. ALCANCORP, which falls in this category, can have the issue decided in its California state court lawsuit. Obviously the only proper procedure is for ALCANCORP to proceed with its state

remedies rather than to have petitioner proceed in the federal court in behalf of ALCANCORP.

In the second note in *Container* upon which petitioner relies, this Court said:

> "We recognize that the fact that the legal incidence of a tax falls on a corporation whose formal corporate domicile is domestic might be less significant in the case of a domestic corporation that was owned by foreign interests. We need not decide here whether such a case would require us to alter our analysis." (103 S. Ct. at 2956, n. 32.)

This note does not state that a foreign, nontaxpaying parent has standing in federal court to challenge a state tax on its United States subsidiary. Nor is there any such pronouncement in the body of the *Container* decision itself. But that is precisely what petitioner argues.

C. The Undisputed Facts Unequivocally Demonstrate That Petitioner Has No Standing To Sue

On the basis of the undisputed facts, it is clear that petitioner has no standing to sue. The FTB has not assessed or sought to assess any tax against petitioner, nor has it sought to take any action against petitioner, which is a foreign corporation that does no business in the United States and is not a California taxpayer.

The tax in question has been imposed by FTB upon ALCANCORP, petitioner's California subsidiary. The amount of the tax is based on a formula, popularly known as formula apportionment, which includes the income and factors of all companies that are in the unitary group, including the foreign parent if it is factually includable in

the group. In this case, if the legality of the amount of the tax imposed is incorrect, ALCANCORP can so prove it in its California lawsuit. In fact, if FTB's errors are patently obvious as petitioner contends they are,[1] then it would be a very simple matter for ALCANCORP to present that evidence to the California court. After all, there is no suggestion that the California courts would not be capable of understanding or following the laws of the nation as interpreted by this Court.

Petitioner is separate and independent from ALCANCORP, the corporation against which the FTB assessed the tax. Petitioner occupies the status of a shareholder of ALCANCORP. Obviously as a shareholder, petitioner has no inherent right to receive anything from ALCANCORP. It certainly does not have the right to receive monthly, quarterly, or annual or any other form of dividend. In fact, as a shareholder of ALANCORP, petitioner owns neither the corporate property nor the corporate earnings of ALCANCORP; it simply has an expectancy in each. This well-established proposition was stated by this Court in these words:

> "The owner of the shares of stock in a company is not the owner of the corporation's property. He has a right to his share in the earnings of the corporation, as they may be declared in dividends arising from the use of all its property. In the dissolution of the corporation he may take his proportionate share in what is left, after all the debts of the corporation have been paid and the assets are divided in accordance with the law of its creation. But he does not own the cor-

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[1]Petitioner argued before the court below that the obvious errors were shown in ten pages of its appellate brief. (Petitioner's App. Br., pp. 17-29.)

porate property." (*Rhode Island Hospital Trust Co. v. Doughton* (1926) 270 U. S. 69, 81.)

Moreover, it is well established that although an injury to a corporation may indirectly harm a shareholder by decreasing the value of his shares, that fact does not give the shareholder standing to sue on his own behalf. The primary injury and the primary right to sue are the corporation's; the shareholder may sue, if at all, only in a proper derivative action. (*Von Brimer v. Whirlpool Corp.* (9th Cir. 1976) 536 F. 2d 838, 846; *Erlich v. Glasner* (9th Cir. 1969) 418 F. 2d 226, 227-228; *Papilsky v. Berndt* (2d Cir. 1972) 466 F. 2d 251, 255, cert. den. 409 U. S. 1077; *Jensen v. Voyles* (10th Cir. 1968) 393 F. 2d 131, 133.)

Therefore, in light of the nature of petitioner's interest in ALCANCORP, petitioner cannot truly show any injury. Nor can petitioner show that the relief it seeks will correct the matter. Nor is an adjudication in this case necessary because ALCANCORP will be the best proponent of its own rights regarding the applicability to it of the unitary method of taxation. Finally, there is no obstacle to ALCANCORP asserting its rights before the California court. ALCANCORP can raise in the California court all of the defenses that petitioner seeks to raise here, including challenges to the constitutionality of the unitary method of taxation.

D. The Most Recent Decisions Of This Court Confirm That Petitioner Has No Standing

In the last few years there have been several major decisions involving the question of standing. However, in none of these cases has this Court expanded the standing doctrine to a person such as petitioner, who was in-

directly affected by some governmental action, or where the directly affected person had a remedy in the state courts, or where that person was actually litigating the identical issues against the same defendant in the state courts.

The doctrine of standing was succinctly summarized in *Simon v. Eastern Ky. Welfare Rights Org.* (1976) 426 U. S. 26 [48 L. Ed. 2d 450, 96 S. Ct. 1917]. This Court stated:

> "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies. See *Flast v. Cohen*, 392 U. S. 83, 95, 88 S. Ct. 1942, 1950, 20 L. Ed. 2d 947, 959 (1968). The concept of standing is part of this limitation. Unlike other associated doctrines, for example, that which restrains federal courts from deciding political questions, standing 'focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated.' *Id.*, at 99, 88 S. Ct., at 1952, 20 L. Ed. 2d at 961. As we reiterated last Term, the standing question in its Art. III aspect 'is whether the plaintiff has "alleged such a personal stake in the controversy" as to warrant *his* invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf.' *Warth v. Seldin*, 422 U. S. 490, 498-99, 95 S. Ct. 219, 2205, 45 L. Ed. 2d 343, 354 (1975) (emphasis in original). In sum when a plaintiff's standing is brought into issue, the relevant inquiry is whether, assuming justiciability of the claim, the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision. Absent such a showing, exercise of its power by a federal court would be gratuitous and thus inconsistent with the Art. III limitation." (426 U. S. at pp. 37-38.)

Here not only is petitioner's purported injury speculative, there is absolutely no assurance of redress. Even if this Court should rule that the unitary tax as applied to ALCANCORP is unconstitutional, there is absolutely no assurance that ALCANCORP will declare a larger dividend to petitioner or that its value in the ALCANCORP stock will be enhanced. Moreover, in a concurring opinion, Justice Stewart expressed the applicable maxim of tax law in the following words:

> "I add only that I cannot now imagine a case, at least outside the First Amendment area, where a person whose own tax liability was not affected ever could have standing to litigate the federal tax liability of someone else." (*Id.*, at p. 46.)

Then very recently in its decision in *Valley Forge College v. Americans United* (1982) — U. S. — [70 L. Ed. 2d 700], this Court reiterated the rule that "[t]he exercise of judicial power . . . is . . . restricted to litigants who can show 'injury in fact' resulting from the action which they seek to have the Court adjudicate." (*Id.* at p. 710.) This Court also made clear that "injury in fact" must consist of something more than the invasion of an "individuated right" or "personal constitutional right" to a governmental observance of the Constitution. Rejecting the notion that mere allegation of a legal right is sufficient to confer standing, the court stated ". . . assertion of a right to a particular kind of government conduct, which the government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning." (*Id.*, at p. 717.)

Here, petitioner has not alleged any palpable injury in fact to itself. Petitioner has consistently claimed be-

fore the district court and the court of appeals that FTB's proposed assessment against ALCANCORP, if allowed to stand, will result in a diminution in value of its shareholding interest in ALCANCORP. Obviously, that allegation does not bestow standing upon petitioner.

II.

Petitioner's Interpretation of Japan Line Fails To Furnish It With Standing

Petitioner relies on *Japan Line, Ltd. v. County of Los Angeles* (1978) 441 U.S. 434, particularly as construed by this Court in *Container* to support its argument that it has standing on its own right. But petitioner's reading of *Japan Line* and *Container* is erroneous. With respect to double taxation, this Court's references to it in *Container* was to double taxation by California upon the corporation doing business in California and upon which the FTB imposed the tax. California clearly could not have taxed petitioner even once because it is not subject to California jurisdiction. Thus, if there was double taxation, then petitioner's California subsidiary, ALCANCORP, can readily litigate that issue before the California court in the latter's pending lawsuit. As a matter of fact, ALCANCORP has expressly raised the double taxation issue, the foreign commerce issue, as well as many, many others.

Furthermore, in *Container,* this Court has distinguished *Japan Line* in several ways. In this respect the Court said:

> "Nevertheless, there are also a number of ways in which this case is clearly distinguishable from *Japan*

Line. First, it involves a tax on income rather than a tax on property. . . . Second, the double taxation in this case, although real, is not the 'inevitabl[e]' result of the California taxing scheme. . . . The third difference between this case and *Japan Line* is that the tax here falls, not on foreign owners of an instrumentality of foreign commerce, but on a corporation domiciled and headquartered in the United States." (*Container*, 103 S. Ct. at 2952.)

This Court went on to unequivocally declare that "[I]f California's method of formula apportionment 'inevitably' led to double taxation, see *supra*, at 26-27, that might be reason enough to render it suspect. But since it does not . . . ." (*Id.*, at 2954.) Finally, this Court found that in the absence of Congressional and Executive Branch action, the foreign policy of the United States is not seriously threatened by California's use of the unitary business concept on a worldwide basis. (*Id.*, at 2956.)

Ironically on September 23, 1983, well before the date on which this petition was filed,[2] President Reagan decided not to file a petition for rehearing in *Container*. At the same time the President also decided to establish a working group, comprised of representatives from the federal and state governments and the multinational business community to study the states' use of the worldwide unitary method of taxation. In implementation of this decision, Secretary of Treasury Donald Regan has formed a working group which is now beginning to review the uni-

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[2]Although, petitioner did not file its petition until October 13, 1983, petitioner did not mention the most recent actions taken by the federal government with respect to the worldwide unitary taxation question.

tary method.[3] In any event, to date the federal government has not established any policy forbidding the states from using the unitary method on a worldwide basis. If anything, based on newspaper reports, the President apparently believes that "[F]ederal intervention in state tax matters is objectionable in principle."[4]

III.

Petitioner's Argument That Only A Foreign Parent Can Raise the Foreign Commerce Issue Is Without Any Support

Petitioner begins its argument with the totally unsubstantiated statement that "the economic impact of the tax is exactly the same on the Petitioner as it is on its domestic subsidiary." (Petn. for Cer., pp. 14-15.) Then petitioner speculates that the FTB will contend in the California state court in ALCANCORP's tax refund action that ALCANCORP cannot raise the foreign commerce issue. Petitioner further suggests that FTB should make certain arguments before the California state court. How absurd! There can be no doubt that the California court would consider the foreign commerce question in ALCANCORP's California lawsuit, particularly in light

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[3]See attached Appendix A, which consists of reproduced copies of Treasury News of September 30, 1983, telegram by Treasury Secretary Donald T. Regan, Treasury News of October 28, 1983 and Treasury Department's Notice of October 3, 1983.

[4]Sacramento Bee, September 14, 1983, at A13, col. 1.

of this Court's notes 26 and 32, 77 L. Ed. 2d at 568 and 572.

Any "Catch-22" situation (Petn. for Cert., p. 17) exists only in the mind of petitioner. Obviously, petitioner has made the "Catch-22" statement in a futile back-door effort to gain the attention of this Court since it has no legal bases for its position.

Finally, as far as the alleged question involving the congressional "intent" of the Tax Injunction Act is concerned, the subject was never presented to the courts below. In any event, petitioner's reliance on *Hillsborough v. Cromwell* (1946) 326 U. S. 620, and *California v. Grace Brethren Church* (1982) 457 U. S. 393, is erroneous as these cases involved taxpayer's remedies before the state courts. They are irrelevant here where the question is one of standing of a nontaxpayer.

CONCLUSION

In summary, petitioner has totally failed to establish that it has standing to sue. Petitioner also has not pointed to the existence of a single fact, as opposed to its conjective and speculative assertions, to demonstrate that the named defendants have violated petitioner's purported rights under the United States Constitution or laws. Nor has petitioner cited one case which supports its contention in effect that the FTB cannot assess a corporation

doing business in California, viz., ALCANCORP, under the unitary method. Thus, petitioner's action is totally devoid of merit, and the petition should be denied.

DATED: November 22, 1983.

Respectfully submitted,

JOHN K. VAN DE KAMP
Attorney General

EDWARD P. HOLLINGSHEAD
Deputy Attorney General
Counsel of Record

CHARLES C. KOBAYASHI
Deputy Attorney General

Attorneys for Defendants, Appellees and Respondents

APPENDIX "A"

TREASURY NEWS

Department of the Treasury Washington, D. C.
Telephone 566-2041

For Immediate Release
Friday, September 30, 1983

Contact: Charles Powers
566-2041

STATEMENT BY TREASURY SECRETARY DONALD T. REGAN ON UNITARY TAXATION

Secretary of the Treasury Donald T. Regan has invited representatives of all groups involved in the states' use of the worldwide unitary method of taxation to a meeting at the Treasury Department on October 7, 1983.

The purpose of this *informal discussion* is to produce constructive ideas and suggestions *for the development of* the *offcial working group* on unitary taxation.

President Reagan last week asked the Treasury Secretary to establish and chair a high-level working group to explore and attempt to resolve the complex issues involved in the unitary method of taxation.

[List of invitees and telegram of invitation attached.]

OUTGOING TELEGRAM
Continuation Page

Last Words From Prior Page

Page Unclassification

President Reagan has asked me to establish a high-level working group to explore and attempt to resolve the com-

plex issues involved in the states' use of the worldwide unitary method of taxation. This group, which I will chair, will be composed of representatives of the federal government, state government, and the business community. Its mission is to develop as quickly as possible a federal policy conducive to harmonious international economic relations while respecting the fiscal rights and privileges of individual states, their need for revenues, as well as considering the views of our trading partners.

In order to explore the issues involved, I would like to invite you to attend a meeting on Friday, October 7, 1983, from 10:30 a.m.-12 noon in Room 4426 at the Treasury Department. It is my hope that this informal discussion, which will include representatives of all the groups involved, will produce constructive ideas and suggestions for an official working group on unitary taxation. A letter of confirmation follows.

Please contact Assistant Secretary of the Treasury Bruce Thompson at (202) 566-8191 regarding your acceptance and detailed arrangements.

Donald T. Regan

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TREASURY NEWS

Department of the Treasury Washington, D. C.
Telephone 566-2041

For Immediate Release
October 28, 1983

Contact: Charles Powers
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Treasury Announces Membership of Worldwide Unitary Taxation Working Group

Secretary of the Treasury Donald T. Regan today announced the membership of the Worldwide Unitary Taxation Working Group. This group, composed of representatives of the federal government, state governments, and the business community, will advise the Treasury and assist in the development of a policy dealing with the complex issues involved in the states' use of the worldwide unitary method of taxation.

The first public meeting of the Working Group, which will be chaired by Secretary Regan, will be held on Wednesday, November 2, 1983, at 10:30 a.m. in the Cash Room of the Treasury Department. Charles E. McLure Jr., Deputy Assistant Secretary of the Treasury (Tax Analysis), will serve as the Group's Staff Director. The members of the Working Group are as follows:

Mr. John R. Opel
Chairman and Chief

The Honorable
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The following federal government representatives will assist the Chairman:

The Honorable
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Assistant Secretary
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The Honorable
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Under Secretary for
Economic Affairs
Department of State

The Honorable
John A. Svahn
Assistant to the President
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DEPARTMENT OF THE TREASURY
Office of the Secretary

WORLDWIDE UNITARY TAXATION WORKING GROUP ESTABLISHMENT AND MEETING NOTICE

Pursuant to the Federal Advisory Committee Act (PL. 94-463) the Department of the Treasury announces the establishment and a meeting of the Worldwide Unitary Taxation Working Group.

The Working Group, composed of representatives of the Federal government, state governments, and the business community, will advise and assist in the development of a policy dealing with the comlex issues involved in the states' use of the worldwide unitary method of taxation. It is in the public interest that this tax issue affecting our

individual states and our trading partners be resolved in a fair and workable manner by a cooperative effort of the affected parties.

The Working Group will meet at *10:30 A. M.*, on November 2 in the Cash Room of the Main Treasury Building. The purpose of the meeting is to define the work plan and develop a time frame for deliberations. The agenda includes the following topics for discussion:

1. A consistent and appropriate definition of a unitary business.
2. The application of the three-factor formula in an international context, including its impact on international income flows.
3. Uniform rules and standards to alleviate administrative burdens while respecting state fiscal sovereignty.
4. An equitable resolution to the problems raised by foreign governments and foreign-based multinationals.
5. The treatment of intercorporate dividends.
6. Federal-state sharing of tax information, including transfer pricing adjustments.
7. Uniform reporting requirements and joint state audits.

Inquiries concerning the Working Group should be addressed to Charles McLure, Room 3108, Main Treasury, 15th & Penn., N. W., Washington, D. C. 20220, Telephone 566-2563.

/s/ John E. Chapoton
Assistant Secretary
(Tax Policy)

Dated: Oct. 2, 1983

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No. 83-638

In the Supreme Court of the United States

October Term, 1983

ALCAN ALUMINIUM LIMITED,
Petitioner,

vs.

THE FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, Operating through its New York Office; FRANK GOODMAN, Individually, and as District Manager, New York Office of the Franchise Tax Board of the State of California; and JOSEPH E. GEOGHEGAN, individually, and Supervisor-Audit Group, New York Office of the Franchise Tax Board of the State of California,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER

INTRODUCTORY STATEMENT

On December 5, 1983, this Court denied an Application for a Writ of Certiorari in *Shell Petroleum N.V. v. Franchetti*, No. 83-586. Although that case posed similar issues, there are fundamental differences which allow the instant case to stand on its own merits.

RIPENESS

The Ninth Circuit dismissed Shell N.V.'s case because the court held it was not ripe for adjudication. There is *no* ripeness issue in the instant case.

STANDING

In *Shell* the Ninth Circuit stated in dictum that Shell N.V. did not have standing to enforce the treaty provisions of the Foreign Commerce and Navigation Treaty between the United States and the Government of the Netherlands. In contrast, the Second Circuit decided that the Petitioner, Alcan Aluminium Limited ("ALCAN"), did not have standing because, according to the Court, the unitary tax imposed by California was exclusively a domestic tax that did not result in any burdens on foreign commerce and, therefore, did not unconstitutionally burden Petitioner.

Although cloaked in the jargon of standing, the issues before the Court in the instant case are not simply procedural. Alcan has asserted that Respondents' method of taxation burdens its activities, which are exclusively in foreign commerce; Alcan has standing because it is directly injured.[1] The Respondents have asserted, and the lower courts have ruled, that the unitary tax is exclusively a domestic tax with no burdens on foreign commerce, and,

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1. Respondents attempt to apply the doctrines of *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976) and *Valley Forge College v. Americans United*, 454 U.S. 464 (1982) is completely misplaced. First, both cases involve factual settings which are totally inapplicable to this situation. Second, the legal doctrine in both cases turns on the absence of an allegation of direct injury, an allegation which clearly exists in this case.

therefore, Petitioner is not directly injured, rather it is only injured as a shareholder. Thus, in contrast to the *Shell* case, the instant case presents a fundamental Foreign Commerce Clause challenge to combined worldwide apportionment.

DOMESTIC SUBSIDIARY'S STATE COURT ACTION

Respondents' position that Foreign Commerce Clause objections are properly raised by the Petitioner's domestic subsidiary ("ALCANCORP") in its state action has no merit. If the lower courts and Respondents are correct that Petitioner's only injury is that of a shareholder and that the tax has no foreign commerce consequences, then no foreign commerce issue exists to be raised by Alcancorp. The Foreign Commerce Clause issue must be resolved in the instant case.

CONCLUSION

This case, unlike *Shell*, presents the exact issue the Court left unresolved in its recent decision in *Container Corporation of America v. Franchise Tax Board*, ... U.S. ....., 77 L. Ed. 2d 545, 103 S. Ct. 2933 (1983): the application of combined worldwide apportionment to domestic subsidiary—foreign parent combinations. Although characterized as a standing issue, the heart of the controversy, in fact, is the existence or non-existence of unconstitutional burdens on foreign commerce. This issue is properly before the Court; there is no ripeness issue in this case; and there is no merit to the proposition that this issue can be raised by the domestic subsidiary in a manner consistent

with the reasoning of the lower courts. The Court should issue a Writ of Certiorari.

Respectfully submitted,

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OCTOBER TERM, 1983

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF THE GOVERNMENT OF CANADA AS AMICUS CURIAE SUPPORTING CERTIORARI

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IN THE

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No. 83-638

ALCAN ALUMINIUM LIMITED,
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THE FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, Operating Through its New York Office; FRANK GOODMAN, Individually, and as District Manager, New York Office of the Franchise Tax Board of the State of California; and JOSEPH E. GOEGHEGAN, Individually, and As Supervisor-Audit Group, New York Office of the Franchise Tax Board of the State of California,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF OF THE GOVERNMENT OF CANADA AS AMICUS CURIAE SUPPORTING CERTIORARI

INTEREST OF AMICUS CURIAE

This case presents important questions concerning the Foreign Commerce Clause of the United States Constitution, which provides that "Congress shall have Power . . . To regulate Commerce with Foreign Nations . . . ."[1] The decision below holds in effect that the application by a State of the United States of a "unitary" method of

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[1] Art. I., § 8, cl. 3.

taxation to the combined worldwide incomes of a domestic subsidiary and its foreign parent does not violate the Foreign Commerce Clause even though the unitary method conflicts with the "arm's length" method used by the United States government and accepted internationally.

The foreign parent in this case is Alcan Aluminium Limited, a corporation organized and existing under the laws of Canada. The decision below imposes significant financial and administrative burdens on Canadian companies engaged (through subsidiaries or otherwise) in trade or other gainful pursuit in the United States. Because of the extensive Canadian investment in the United States,[2] the participation by Canadian corporations in business activities involving both the United States and third countries, and the adverse impact that the decision below will have on those activities, the Government of Canada has a significant interest in the disposition of this petition for certiorari.[3]

SUMMARY OF ARGUMENT

This case, on the merits, presents an issue of great international concern. That issue is whether a State of the United States may, consistently with the Constitution of the United States, apply a unitary method of income taxation to the aggregate worldwide incomes of a foreign parent company, its U.S. subsidiary and all of its foreign subsidiaries for purposes of determining the domestic

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[2] Canadian direct investment in the United States at the end of 1982 exceeded $9.8 billion. Bureau of Economic Analysis, United States Department of Commerce, *Foreign Direct Investment in the United States in 1982*, 63 Survey of Current Business 31, 36 (Aug. 1983, No. 8). Canada accounted for 10 per cent of foreign direct investment in the United States at the end of 1982. *Id.* at 32.

[3] The Department of State has encouraged foreign governments to assert interests of this nature by filing amicus briefs in pending judicial proceedings.

subsidiary's State tax liability.[4] Attempts by California and an increasing number of other States to impose varying versions of such unitary taxation on foreign corporations have provoked protests to the Government of the United States by major trading partners—including the Government of Canada, which has been emphatic in expressing its views on this issue.[5]

Last Term, the Court expressly reserved decision on the constitutionality of this practice when it decided *Container Corporation of America v. Franchise Tax Board.*[6] That case involved the separate issue of the constitutionality of California's unitary taxation of a U.S. parent company and its foreign subsidiaries.[7] California's attempt to reach to the worldwide income of a *foreign* parent company and its foreign subsidiaries raises different and more difficult constitutional questions than the practice sustained in *Container Corporation.*

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[4] As the district court found below, under California's unitary taxation scheme, the separate identities of corporate family members are disregarded and consolidated for purposes of determining the net income of that business. Once this figure is ascertained, the percentages of the business entity's sales, property and payroll within California are averaged. The previously determined net income is then multiplied by the average percentage to arrive at the corporation's tax liability. Petition App. II at A5.

[5] Prime Minister Trudeau expressed the Canadian Government's "serious concern" about this issue in a September 24, 1983 letter to President Reagan. Previously, Finance Minister Marc Lalonde had raised these concerns in a letter to Secretary of the Treasury Regan. On September 28, 1983, the Embassy of Canada reiterated its long-standing concerns to the U.S. Department of State. Similar concerns were raised by the Embassy of Greece on behalf of the Ten European Community Governments (August 1, 1983); the Japanese Government (August 11, 1983); and the Australian Government (November 7, 1983). These notes are reproduced in the Appendix to this Brief.

[6] 103 S. Ct. 2933 (1983).

[7] 103 S. Ct. at 2952 n.26, 2956 n.32.

Those questions go to the very heart of the foreign commercial relationships between the United States and its trading partners—the regulation of which lies squarely and exclusively with the Congress under the U.S. Constitution.[8]

The courts below ruled that Alcan (which they characterized as a mere shareholder of its wholly owned U.S. subsidiary Alcancorp) lacked standing to challenge the constitutionality of California's application of the unitary tax method to the incomes of Alcan and its nearly 100 non-U.S. subsidiaries operating worldwide. The district court purported to base its holding on a finding that Alcan lacked standing and ruled that it would not reach the merits of Alcan's complaint. However, the district court supported its holding on standing by finding that California had only taxed what it was entitled to tax—a holding on the merits—and that the unitary tax applied by the Respondents does not result in multiple taxation of Alcan's foreign income nor result in any burden upon foreign commerce.[9] The court of appeals adopted the district court's opinion as its own, and affirmed.

The Government of Canada finds it anomalous that while the worldwide income of the Alcan group of companies is held eligible for taxation by States of the United States, the parent corporation—a member of the income group which is effectively the subject of taxation—is deemed ineligible to seek review of that taxation method by the courts of the United States.

The Government of Canada submits that the decision below will have a decided and deleterious effect on global trade and investment. That decision flatly contradicts the principles enunciated by the Court in *Japan Line*,

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[8] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

[9] *See* Pet. App. II at A7-A8, A10.

Ltd. v. County of Los Angeles,[10] and *Container Corporation* in that: (1) the unitary tax scheme sanctioned therein is incompatible with the principles of income allocation utilized by the United States government and by the international community, and exposes the income of Canadian and other foreign companies, which is also subject to taxation by the foreign countries of their commercial domicile, to multiple taxation; (2) the decision below results in a significant and growing burden upon the foreign parent and foreign subsidiaries of multinational corporations, which must compile and submit in varying formats to the States of the United States sensitive financial data on the corporations' extraterritorial activities, thereby further burdening foreign commerce; and (3) the decision below vitiates the ability of the United States to speak with "one voice" in matters of foreign commerce and, by opening the door to other States to adopt similar unitary taxation schemes, invites speaking with a cacophony of voices.

ARGUMENT

I. The Application of California's Unitary Tax Scheme To Foreign Corporations Exposes Them To Multiple Taxation And Thus Imposes A Burden On International Trade and Investment

A recurring issue before this Court in recent years has centered upon the increasing efforts by States of the United States to bring the income earned by affiliated overseas companies into the tax base to which an arbitrary state apportionment formula is then applied. Last Term, in *Container Corporation of America v. Franchise Tax Board*, the Court held that the Constitution does not forbid a State from applying unitary taxation to reach the income earned abroad by the foreign subsidiaries of the U.S. parent company.[11]

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[10] 441 U.S. 434 (1979).

[11] 103 S. Ct. 2933 (1983).

However, the Court expressly reserved decision on the constitutionality of application of the unitary method where the parent company is foreign:

> We have no need to address in this opinion the constitutionality of combined apportionment with respect to state taxation of domestic corporations with *foreign* parents or foreign corporations with either foreign parents or foreign subsidiaries.
>
> . . . .
>
> We recognize that the fact that the legal incidence of a tax falls on a corporation whose formal corporate domicile is domestic might be less significant in the case of a domestic corporation that was owned by *foreign* interests. We need not decide *here* whether such a case would require us to alter our analysis.[12]

Three dissenting Justices stated that an application of unitary taxation to United States activities of a foreign corporation would violate the Constitution.[13] This case involves a Canadian parent, and therefore squarely presents that issue.[14]

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[12] 103 S. Ct. at 2952 n.26, 2956 n.32 (emphasis added).

[13] 103 S. Ct. at 2960 (Powell, J., joined by Burger, C.J., and O'Connor, J., dissenting).

[14] The Government of Canada does not oppose the unitary tax method in principle, nor is it seeking to address herein the relative merits of the unitary method vis-a-vis the arm's length method. Rather, the Government of Canada is complaining of the adverse results caused by simultaneous application of both systems on a Canadian corporation whose operations are generally governed by the internationally accepted arm's length method but whose U.S. operations are subject in California and other States to the entirely different—and irreconcilable—unitary method. For this reason, a reversal by the Court in this case would not affect the prior decisions of the Court with respect to unitary taxation in that the issue here centers on the conflict between two irreconcilable methods of income allocation as opposed to the propriety of those methods.

A. *The Incompatibility of the Unitary Method of Tax Assessment With Generally Accepted Principles of Arm's Length Income Allocation for Tax Purposes Often Results in Multiple Taxation Which Cannot Be Relieved by International Double Taxation Agreements*

At issue here is the clash of two incompatible and irreconcilable methods of income allocation for tax purposes. One method is the internationally accepted "arm's length" approach. The other method is the "unitary business/formula apportionment" method adopted by California and a number of other States of the United States.

Under the arm's length approach, every corporation, even if closely tied to other corporations, is treated for most purposes as if it were an independent entity dealing at arm's length with its affiliated corporations, and is subject to tax only by the jurisdictions in which it operates and only on that portion of its business attributable to the business carried on in that jurisdiction.[15] The unitary system, in contrast, rejects geographical or transactional accounting, treats as one the separate entities—foreign and domestic—that are comprised by an enterprise, and apportions the aggregate income between the taxing jurisdiction and the rest of the world on the basis of an arbitrary formula that can vary from State to State.[16]

As the Court noted in *Container Corporation*, the arm's length method is the international norm adopted by the world community (including the governments of Canada and the United States) for allocating income for tax purposes.[17] It is in accordance with model conventions for the avoidance of multiple taxation adopted by the

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[15] 103 S. Ct. at 2950.

[16] 103 S. Ct. at 2940.

[17] 103 S. Ct. at 2952.

United Nations and the Organization for Economic Cooperation and Development (OECD), both of which expressly rejected formula apportionment (that is, the unitary system) in favor of arm's length allocation.[18] These principles have been adopted by the nations of the world in their double taxation treaties.[19]

As the Court noted in *Container Corporation*, California has adopted a taxing system that represents a "serious divergence" from the internationally accepted taxing method adopted by foreign taxing authorities and preferred by the United States government.[20]

The ramifications of California's using a different system are significant. Most large corporations have profitable as well as less profitable (and some unprofitable) activities. Under the arm's length system, the profitable activities are subject to taxes where profits are made, and the less profitable or unprofitable ones pay less or no taxes in the jurisdictions where they are carried on. The unitary method of income allocation, however, unrealistically implies that individual entities of the entire enterprise (the "unit") have the same level of profitability; for example, in California the amount of taxation in a particular jurisdiction is based on a formula considering only the proportion of property, payroll and sales in that jurisdiction.[21]

In *Container Corporation*, the Court concluded that multiple taxation was possible under both the unitary

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[18] *See* United Nations Model Double Taxation Convention Between Developed and Developing Countries, arts. 7(2), 9(1), U.N. Doc. ST/ESA/102 (1980); Report of the OECD Comm. on Fiscal Affairs, Model Convention for the Avoidance of Double Taxation With Respect to Taxes on Income and on Capital, arts. 7(2), 9(1) (1977).

[19] *See, e.g.*, U.S. Treasury Department's Model Draft Income Tax Treaty of June 16, 1981, arts. 7(2), 9(1), 1 CCH Tax Treaties ¶ 158.

[20] 103 S. Ct. at 2952.

[21] 103 S. Ct. at 2943.

and arm's length methods, and that it therefore would not "require California to give up one allocation method that sometimes results in double taxation in favor of another allocation method that also sometimes results in double taxation." [22] The Court seems to have suggested that multiple taxation under either system would be more or less random and would occur with equal frequency. This suggestion is incorrect.

First. Multiple taxation or undertaxation engendered by California's apportionment scheme is not mere happenstance; it is *inevitable* because the fundamental assumptions underlying the California scheme allocate income to a given jurisdiction in proportion to the wage rates, property values and sales prices in that jurisdiction (rather than upon the income actually earned in that jurisdiction as calculated by the arm's length method).

Thus, if a corporation earns income in non-U.S. jurisdictions whose wage rates, property values and sales prices are lower than the corresponding rates, values and prices in California,[23] California *systematically* allocates only a proportion of that foreign income to the foreign jurisdiction where it is earned, thereby subjecting the unallocated portion to State tax in California notwithstanding the fact that such income has been taxed by the host country under internationally accepted principles of

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[22] 103 S. Ct. at 2954-55.

[23] This is not an infrequent occurrence. In his report to Congress, the Comptroller General noted that although there have been no definitive studies measuring differences in the values of apportionment factors between the United States and foreign countries, "available evidence from independent researchers does indicate that property values and wages, even after adjustments for productivity differences, may be substantially lower in many foreign countries than in the United States." Report by the Comptroller General to the House Comm. on Ways and Means: Key Issues Affecting State Taxation of Multijurisdictional Corporate Income Need Resolving 37 (GAO/GGD-82-38 (1982)) (hereinafter Comptroller General's Report).

taxation. The petitioner Alcan's experience provides a vivid illustration of the unavoidable multiple taxation trap created by California's apportionment scheme.

As Alcan demonstrated below, in years when its U.S. operations were unprofitable and its foreign operations showed profits, it nonetheless paid California income tax.[24] Since Alcan's U.S. operations had no net income to tax, the "income" upon which the California tax was based could only have been obtained by California through the allocation of Alcan's foreign income to California pursuant to the California apportionment formula. However, pursuant to accepted international practice, all of this income was also taxed in the country of origin. Thus, Alcan's experience in California leaves no doubt that this result is neither a random occurrence, nor a matter of mathematical imprecision, but is rather a direct consequence of the application of the unitary scheme.

The only conceivable way whereby the California apportionment formula would not result in multiple taxation (or undertaxation) would be if the income allocated to California pursuant to the apportionment formula were *identical* to the income actually earned by the corporation in California. This is at best a very rare event, and it is mere coincidence when it does occur.

This Court has declared that "[e]ven a slight overlapping of tax" upon foreign commerce warrants close scrutiny.[25] Such scrutiny is clearly warranted here.

Second. It is true that differences in the allocation of income and expenses among national tax jurisdictions employing the arm's length method can also result in multiple taxation or undertaxation. However, these differences, being those of inconsistent applications of the same principle, can be eliminated and are susceptible to

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[24] Pet. App. III at 17.

[25] Japan Line, Ltd. v. United States, 441 U.S. at 456.

resolution through international negotiation and bilateral and multilaterally agreed model tax treaties.

By contrast, multiple taxation arising out of the apportionment method occurs because that method has an entirely different principle for deciding where income is earned. This difference is irreconcilable with the international method, and cannot be harmonized with it. Nor is it relieved by double taxation treaties. Only in the rare happenstance where the very different assumptions underlying both systems yield the same result are they consistent with each other.

The Court has held that a State tax is unconstitutional under the Foreign Commerce Clause if it "creates a substantial risk of international multiple taxation." [26] That risk is unavoidable where, as here, two jurisdictions apply fundamentally different methods for allocating profits.

B. *Utilization of the Unitary Tax Approach Imposes A Significant Administrative Burden on Canadian And Other Foreign Corporations*

The unitary apportionment method used by California and other States to allocate income to U.S. offices or subsidiaries of Canadian companies imposes significant administrative burdens on Canadian companies doing business in those States. Under the unitary method, the profit of a foreign company on its U.S. business is derived from a formula taking account of the income of the foreign company and non-U.S. subsidiaries worldwide as well as elements such as the assets, payroll and sales of all such companies. For a foreign multinational company with many subsidiaries in different countries, the submission of financial data for all of these companies to a State of the United States imposes a costly burden.

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[26] Japan Line, Ltd. v. United States, 441 U.S. at 451.

The additional administrative burden results from the need to determine whether foreign corporations should be included in the unitary business group, adjusting foreign financial statements to reflect State income tax laws, and translating multiple foreign currency into U.S. dollars.[27] This burden is extreme in the case of widespread multinational corporations because accounting procedures, language and currencies vary significantly from one foreign country to another. Data may have to be obtained from all subsidiaries (nearly 100 in Alcan's case) operating in numerous foreign countries.[28] The information obtained from foreign subsidiaries is often in a foreign language, requiring translation.[29] The foreign company must also perform a "foreign currency translation" with respect to foreign financial data to achieve comparability between U.S. dollars and various foreign currencies, a procedure the Comptroller General has characterized as "a laborious task." [30] While U.S. multinationals are required under U.S. federal law to file consolidated returns for tax purposes, such a requirement does not otherwise exist for Canadian multinationals under U.S. or Canadian tax laws and thus because of unitary taxation the extra administrative burden on Canada multinationals is significant.[31]

The costs of compliance are compounded by the need to prepare separate returns that conform to the varying State tax accounting requirements of the States presently employing some variant of the California scheme. As the Comptroller General has noted, corporate taxpayers must treat the income tax returns for each State separately, and a multijurisdictional taxpayer would have to

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[27] *See* Comptroller General's Report at 37.

[28] *Id.* at 38.

[29] *Id.*

[30] *Id.* at 39.

[31] *Id.* at 40.

make "still more calculations for every other area where nonuniformity exists . . . ."[32] This problem will only grow if the decision below stands, and additional States adopt the unitary method.[33]

Although this burden falls particularly heavily on Canadian corporations because of their extensive U.S. investments, the problem, like the reach of the unitary system, is global.

Underlying all of this is the element of requiring foreign corporations to disclose detailed, highly sensitive information regarding their worldwide operations in order to comply with the accounting requirements of a State of the United States.

Moreover, the tax—which results in multiple taxation —clearly serves as a disincentive for foreign investment in the United States. If a foreign parent creates a U.S. subsidiary within the borders of California, it exposes its non-U.S. activities to California tax notwithstanding the unprofitability of the new U.S. venture. The only way a foreign corporation could avoid such consequences is to forego or abandon investment in California altogether. The imposition of the unitary tax thus has a chilling effect on the framework established by the United States and its partners to encourage foreign investment and to facilitate international trade.[34]

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[32] *Id.* at 17.

[33] Prior to the Court's decision in *Container Corporation*, ten States applied unitary taxation on a worldwide basis. Following the *Container Corporation* decision, Florida adopted a similar system. According to one Florida legislator, "[i]t was like finding money on the street . . . ." *Florida's Legislature Is Latest To Approve Unitary Tax Law*, Wall St. J., July 19, 1983, at 29, Col. 1.

[34] Many businesses have stated that they have elected not to locate in California, and others have considered withdrawing from California because of the unitary tax. *State Taxation of Interstate Commerce and Worldwide Corporate Income: Hearing Before the Subcomm. on Taxation and Debt Management Generally of the*

C. *Utilization of a Unitary Tax Scheme by the States of the United States Prevents the United States From Speaking With "One Voice" in Regulating Foreign Commerce*

It is a well-recognized and longstanding doctrine of constitutional law that "[i]n international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power."[35] In *Japan Line*, the Court recognized that a State tax on foreign commerce may frustrate the achievement of federal uniformity, and held that such a tax is unconstitutional if it prevents the Federal Government from speaking with "one voice" in international trade.[36] The Court noted that a State tax would frustrate federal uniformity if it created an "asymmetry" in the international tax structure, or other States followed the taxing State's example, thereby subjecting foreign commerce to "varying degrees of multiple taxation."[37] In *Container Corporation*, the

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Senate Comm. on Finance, 96th Cong., 2d Sess. 60, 68-71 (1980). The impact of the unitary tax is illustrated by the recent statement of the vice president of the Sony Corporation of America, which commenced operations in California in 1972 prior to California's adoption of the unitary tax:

> "We were very anxious to make things in America. We had to train people, and they had to master new machines, so productivity is low at the beginning. It was expensive and we lost money, but we did it. Then a few years later the tax people came and said we had so much payroll and property in California that we must pay more tax.
>
> "I said, 'Don't you tax people where they make money?' They said, 'I'm sorry, Mr. Wada, but we tax where you have property and payroll.' I don't understand this."

Unitary Tax Scope Widens, N.Y. Times, Oct. 18, 1983, at D2, Col. 1.

[35] Board of Trustees v. United States, 289 U.S. 48, 59 (1933).

[36] 441 U.S. at 451.

[37] 441 U.S. at 450-51.

Court concluded that the California income tax (unlike the California property tax in *Japan Line*) did not violate the Foreign Commerce Clause because: (i) it did not create an "*automatic* asymmetry" in the international tax structure; (ii) the tax fell upon a *domestic* parent company; and (iii) the issue was therefore one of local rather than international concern in that foreign nations had no significant interest in reducing the tax burden of a domestic U.S. corporation.[38]

The present case involves the specific concerns raised by the Court with respect to the California tax in *Japan Line*, and *contains none of the distinguishing factors* enumerated by the Court in upholding the application of the California tax to United States corporations in *Container Corporation*. Indeed, this case is the very case on which the Court reserved decision in *Container Corporation*.

As shown above, application of the California tax creates an automatic asymmetry in the international tax structure, and the parent company in this case, unlike the parent in *Container Corporation*, is a foreign company located in Canada.

Moreover, if the California scheme stands, it opens the door for more States to impose analogous schemes, thereby creating a myriad of multiple taxation formats, which in turn would result in the United States speaking with "many voices" in the realm of foreign commerce.

In *Japan Line*, the Court, in holding a California tax unconstitutional under the Foreign Commerce Clause, declared: "California, by its unilateral act, cannot be permitted to place these impediments before this Nation's conduct of its foreign relations and its foreign trade." [39]

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[38] 103 S. Ct. at 2955-56.

[39] 441 U.S. at 453.

Here, California, by its unilateral act, has established an income allocation and taxation scheme at variance with the international system. This State-created regulation of international earnings is a compelling reason for review by this Court.

CONCLUSION

For these reasons, the Government of Canada respectfully submits that this Court should grant the writ of certiorari.

Respectfully submitted,

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APPENDIX

[SEAL]

PRIME MINISTER • PREMIER MINISTRE
OTTAWA, K1A OA2

September 24, 1983

Dear Ron,

I am writing to you to express the Canadian government's serious concern about the unitary tax issue which I understand you are now considering.

This method of taxation which permits individual state governments to levy taxes against the world-wide earnings of multinational corporations is, in our view, undesirable. In many cases, it places international enterprises in the position of having to pay tax in one jurisdiction for profits earned (and taxed) elsewhere.

The recent Supreme Court decision in the case of Container Corporation vs the California State Franchise Tax Board has considerably heightened the Canadian government's concerns. In addition to the serious potential for double taxation and the increased administrative costs for business, there is the danger that other states and countries, more occupied with a need for increased tax revenues than with consistent tax standards, may adopt this method.

I realize that the issues involved here are not simple, but I am concerned that this could become a major stumbling block to international business and have an effect on our bilateral economic relations. Accordingly, I

would strongly encourage your decision to be one that would lead to a curtailing of this practice.

Yours sincerely,

/s/ Pierre

The Honourable Ronald Reagan
President of the United States of America
The White House
Washington, D.C.

Minister of Finance Ministre des Finances
Ottawa, Canada
K1A 0G5

Dear Mr. Secretary:

I have recently had drawn to my attention the decision in the case of Container Corporation of America vs the California Franchise Tax Board in which the United States Supreme Court upheld the right of a state to use the unitary method of taxing corporate income.

The unitary method of taxation is a cause of considerable concern to a number of Canadian-based multinational corporations. Their concern arises out of three main considerations. First, the unitary method, by applying an arbitrary allocation formula to the consolidated world earnings of a corporate group, departs from the generally accepted international norm for determining the geographic source of income for tax purposes and gives rise to a serious potential for double taxation. Second, the costs of compliance arising out of the need to prepare consolidated returns that conform to the state tax accounting requirements are particularly onerous for Canadian and other foreign-based companies. Third, there is a concern that the sanction of the unitary method will result in its adoption by an increasing number of states and, possibly, by certain foreign countries as a means of increasing their tax revenues.

I understand that you have indicated recently that you were giving consideration to possible legislative initiatives as a result of the Supreme Court decision. I recognize that the issues involved are both complex and sensitive, but the application of the unitary method of taxation to the foreign source income of non-U.S. companies poses difficult problems for a large segment of the international business community. My purpose in writing is to emphasize the seriousness of those problems and to encourage

you to give urgent consideration to the ways in which they might be resolved.

With all good wishes and kind regards.

Sincerely,

Marc Lalonde

The Honourable Donald T. Regan
Secretary to the Treasury
Washington, D.C.
U.S.A. 20220

[SEAL]

Canadian Embassy Ambassade du Canada

NOTE NO. 481

The Embassy of Canada presents its compliments to the Department of State and has the honour to refer to the unitary method of tax assessment practiced by some state taxation authorities in the United States.

The Department of State will recall that the Canadian Government has expressed its concerns about the use of the unitary tax assessment method on a number of occasions. Briefly, these concerns are:

a) the unitary method, by applying an arbitrary allocation formula to the consolidated world earnings of a multinational corporate group, departs from the generally accepted international standard for determining the geographic source of income for tax purposes. This leaves open the serious potential for double taxation;

b) the costs of compliance arising from the need to prepare consolidated returns that conform to the various State tax accounting requirements for the unitary method are onerous; and

c) the continued use of the unitary method could result in its adoption by an increasing number of States, as well as give rise to its use by certain foreign countries as a means of increasing their tax revenues.

The Government has now become aware of circumstances affecting a Canadian multinational corporation that finds itself in a disadvantageous position as a result of the unitary method employed by the State of California. The case involves AlcanAluminum Limited (Alcan), a Canadian corporation, with a United States subsidiary, Alcan Aluminum Corporation (Alancorp), that has op-

erations in a number of States, including California. The California tax authorities have ruled that Alancorp's income for State taxation purposes should be determined on the basis of the worldwide income of Alcan. As a result of the use of this assessment method, Alancorp has been determined to owe substantially higher tax payments to California State authorities than would normally have been the case. Since the 1965 incorporation of the company in its present form the company has been assessed under the unitary method employed by the State of California a substantial income tax in at least 7 years during which it had low levels of income or losses on its United States federal income tax returns and in its audited financial statements.

Alcan has attempted to pursue its dispute with the California State tax authorities over the use of the unitary method in the United States courts because it has no access to the California State Courts. However, in decisions by both the Southern District Court of New York and the Second Circuit Court Alcan's actions have been dismissed on the ground that the parent corporation had no standing. The Canadian Government finds it anomalous that while the worldwide income of Alcan is held eligible for taxation by States in this Country, the parent corporation—a member of the income group which is effectively the subject of taxation, is deemed ineligible to seek review of the taxation method by the United States Courts.

Alcan is now in a position to file a petition for certiorari on this issue with the United States Supreme Court and will be doing so in the near future. In light of the aforementioned general concerns about the unitary method and the serious potential implications that its practice holds for international commerce and foreign relations, the Government of Canada would urge the

United States Government to file a memorandum as amicus curiae in support of Alcan's petition.

The recent decision of the Supreme Court on Container Corp vs California Franchise Tax Board makes clear that the Court took the absence of a United States Government amicus curiae brief into consideration in its assessment of the foreign policy implications in that case and that the Court considered the absence of such a brief not to be a neutral position. In a case involving the interests of a foreign-based multinational firm, the Administration's assessment of the foreign commerce and relations issues would be especially important for the Court's consideration. The Alcan case has particular relevance to the unitary tax issue and the Container Corporation decision. It is an example of a growing number of cases of concern to Canadian companies which have come to the attention of the Canadian Government.

It is the view of the Canadian Government that the Alcan case presents a useful opportunity to address the foreign commerce issue on which the Supreme Court reserved its position in its recent decision on Container Corp vs California Franchise Tax Board. The record and procedural position of the Alcan case is well-suited to a determination by the Supreme Court of the constitutional merits of the challenge to the unitary method based on the burden imposed on foreign commerce. Moreover, this case, in which it is the foreign parent which seeks a decision on the unitary issue, would seem to hold stronger points for consideration by the Court; it would seem doubtful whether a United States subsidiary of a foreign parent could itself assert the implications of the foreign commerce clause as relevant to the unitary tax assessment issue.

The Embassy is prepared to transmit more details on this case as appropriate.

The Embassy of Canada avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

WASHINGTON, D.C.
28 September 1983

[SEAL]

EMBASSY OF GREECE
Washington, D.C.

The Embassy of Greece presents its compliments to the Department of State and, on behalf of the Ten European Community Governments, of which the Government of Greece has now the presidency, it has the honor to forward the attached Note on the problems of the unitary method of taxation.

The Embassy of Greece welcomes the opportunity to renew to the Department of State the assurances of its highest consideration.

Washington, D.C., August 1, 1983

Attached: Note

The Department of State
Washington, D.C.

[SEAL]

UNITARY TAXATION

I. Our governments refer to their note on unitary taxation forwarded to the Department of State by the Embassy of Belgium on 29 June 1982.

II. That note drew the attention of the State Department to the case before the Supreme Court of the Container Corporation of America versus the California Franchise Tax Board and urged as a matter of high priority that the government of the United States should participate in that case as amicus curiae. The decision was handed down by the court on 27 June, 1983, and the court found that application of the unitary business principle by the State of California to Container Corporation and its foreign subsidiaries was proper. A majority of justices held that the fact that no brief had been submitted on behalf of the United States government meant there was no indication that the position taken by the government in the case of the Chicago Bridge and Iron Company still represented its views or that the brief in the Chicago Bridge case applied to the Container case.

III. Although the Supreme Court decision did not apply to US companies with foreign parents, our governments were disappointed by the Container decision. They remain convinced that the unitary basis of taxation with combined reporting, particularly as applied in the international field, is unsatisfactory. Our governments therefore urge that the United States government should give strong support to legislation to ensure that States do not use that method of taxation at least for the subsidiaries of foreign corporations. There are currently two relevant bills in Congress, HR 2918 and S. 1225.

IV. It is particularly important that federal legislation should be adopted at an early stage since

there are already signs that, following the decision in the Container case, other American States not at present using this method are contemplating worldwide combined reporting.

Embassy of Japan
Washington

August 11, 1983

Aide-Memoire

Re: The Unitary Tax System

The Government of Japan wishes to present to the U.S. Government agencies concerned the following views with regard to the Unitary Tax System.

The Unitary Tax System, which has been introduced in California and many other states of the U.S., has put a serious burden and constraint on the management and business activities of Japanese-affiliated companies operating in the U.S. We regard the Unitary Tax System as having the following problems:

—It has been causing international double taxation.

—It requires financial and other documents from the companies concerned, which include not only those of the parent company, but of other affiliated companies all over the world, and thus has imposed a tremendous burden on them.

—It has a discouraging effect on Japanese investment in the U.S., and hampers the sincere efforts by the U.S. and Japanese Governments to actively promote Japan-U.S. investment.

Based on this recognition, the Japanese Government has taken every opportunity to raise this question in such fora as the Japan-U.S. sub-cabinet level meeting and Japan-U.S. Trade Subcommittee, and requested the U.S. Government to take appropriate measures as soon as possible to abolish the Unitary Tax System.

On June 27th, the U.S. Supreme Court decided in the Container Corp. of America *vs* Franchise Tax Board Case, that the Unitary Tax System based upon the worldwide profits of the company concerned, including those of

the overseas affiliated companies, is constitutional. Although the Court decision was not on a case in which the head office is located abroad, we are concerned that the decision would encourage a number of states to newly introduce the Unitary Tax System or discourage the states which already have the System from abolishing it. We wish to reiterate that Unitary Taxation can be a barrier to the expansion and development of Japan-U.S. economic relations, including the promotion of our direct investment.

The Government of Japan, attaching great importance to the U.S. Supreme Court decision of June 27th, again expressed concern over this matter in the Japan-U.S. Trade Subcommittee meeting held this July at Wye Plantation, Maryland. We are encouraged to hear the U.S. Government explain that it is ready to present an amicus curiae brief in cases where diplomatic implication is involved. The Government of Japan strongly wishes that the U.S. Government will support the motion for rehearing, present the amicus curiae brief in connection with the rehearing of this case, and also take the same appropriate measures in connection with other individual cases. The Government of Japan further requests that the U.S. Government take concrete measures as soon as possible, including possible legislative actions, which will lead to the abolition of the Unitary Tax System.

[SEAL]

Note No: 383/83

The Embassy of Australia presents its compliments to the Department of State and has the honour to refer to the application by some States of the United States of the unitary method of taxation of the foreign income of Australian companies conducting business in the United States.

The Government of Australia sees the application of this method of taxation to the overseas income of Australian companies trading in the United States as incompatible with internationally accepted taxation principles embodied in, for example, the model double taxation convention endorsed by the OECD in a recommendation which the United States has approved. Moreover, the same principle which the unitary tax offends is found both in the old and new taxation treaties between the Governments of Australia and the United States.

The method of unitary apportionment raises the real likelihood that economic relations between the United States and other countries such as Australia will be hindered. It creates the possibility of double taxation of income derived from Australian sources of Australian companies carrying on business in the United States. Such Australian companies will be placed in an inequitable position. They would also have to undertake onerous administrative tasks to provide the necessary information to State taxation authorities for assessment of tax liability under the world-wide apportionment formula.

As some Australian companies have already been advised they are liable for payment of unitary taxation, the Government of Australia believes the Government of the United States should take action as soon as possible to minimise the serious implications for international economic relations arising from the application of unitary tax to Australian companies. The need for action is more

pressing in light of the recent Supreme Court decision in Container Corporation of America versus Californian Franchise Tax Board. In this regard the Government of Australia notes that the Supreme Court decision may lead to movement by more State Governments away from the "arms-length" tax method to the world-wide apportionment formula. It also poses the danger of other countries adopting this method of taxation and thus undermining an accepted international basis of taxation.

The Government of Australia notes the establishment of a working group charged with developing Federal policy on the unitary tax problem.

The Government of Australia would appreciate receiving from the Department of State advice on the action of the Government of the United States to resolve the unitary tax problem.

The Embassy of Australia avails itself of this opportunity to renew to the Department of State the assurance of its highest consideration.

[SEAL]

WASHINGTON
7 November 1983

FILED
NOV 23 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-638

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ALCAN ALUMINIUM LIMITED,
Petitioner,

v.

THE FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, Operating Through Its New York Office; FRANK GOODMAN, Individually, and As District Manager, New York Office of the Franchise Tax Board of the State of California; and JOSEPH E. GOEGHEGAN, Individually, and As Supervisor-Audit Group, New York Office of the Franchise Tax Board of the State of California,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF THE GOVERNMENT OF THE UNITED KINGDOM AS AMICUS CURIAE SUPPORTING CERTIORARI

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IN THE

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OCTOBER TERM, 1983

No. 83-638

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THE FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, Operating Through Its New York Office; FRANK GOODMAN, Individually, and As District Manager, New York Office of the Franchise Tax Board of the State of California; and JOSEPH E. GOEGHEGAN, Individually, and As Supervisor-Audit Group, New York Office of the Franchise Tax Board of the State of California,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF THE GOVERNMENT OF THE UNITED KINGDOM AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

This case presents important questions of interpretation concerning the Foreign Commerce Clause of the United States Constitution, which provides that "Congress shall have Power . . . To regulate Commerce with foreign Nations . . . ."[1] The decision below holds in

[1] Art. I., § 8, cl. 3.

effect that the application by a State of the United States of a "unitary" method of taxation to the combined worldwide incomes of a domestic subsidiary and its foreign parent does not violate the Foreign Commerce Clause, even though the unitary method conflicts with the "arm's length" method used by the United States government and the international community generally.

The decision below imposes a significant burden on U.K. companies engaged (through subsidiaries or otherwise) in trade or other gainful pursuit in the United States. Businesses headquartered in the United Kingdom account for more than $23 billion in foreign direct investment in the United States, more than any other nation.[2] Because of the extensive U.K. investment in the United States, the participation by U.K. corporations in business activities involving both the United States and third countries, and the adverse impact that the decision below will have on those activities, the Government of the United Kingdom has a significant interest in the disposition of this petition for certiorari.

SUMMARY OF ARGUMENT

This case, on the merits, presents an issue of great international concern. That issue is whether a State of the United States may, consistently with the Constitution of the United States, apply a unitary method of income taxation to the aggregate worldwide incomes of a foreign parent company, its U.S. subsidiary and all of its foreign subsidiaries for purposes of determining the domestic subsidiary's State tax liability.[3] Attempts by Cal-

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[2] Bureau of Economic Analysis, United States Department of Commerce, *Foreign Direct Investment in the United States in 1982*, 63 Survey of Current Business 31, 36 (Aug. 1983, No. 8).

[3] As the district court found below, under California's unitary taxation scheme, the separate identities of corporate family members are disregarded and consolidated for purposes of determining the net income of that business. Once this figure is ascertained,

ifornia and an increasing number of other States to impose varying versions of such unitary taxation on foreign corporations have provoked protests to the Government of the United States by foreign governments—including the Government of the United Kingdom, which has been emphatic in expressing its views on this issue.[4]

Last Term, the Court expressly reserved decision on the constitutionality of this practice when it decided *Container Corp of America v. Franchise Tax Board*.[5] That case involved the separate issue of the constitutionality of California's unitary taxation of a U.S. parent company and its foreign subsidiaries.[6] California's attempt to reach to the worldwide income of a *foreign* parent company and its foreign subsidiaries raises different and more difficult constitutional questions than the practice sustained in *Container Corporation*. Those questions go to the very heart of the foreign commercial relationships between the United States and its trading partners—the regulation of which lies squarely and exclusively with the Congress under the U.S. Constitution.[7]

The courts below ruled that Alcan (which they characterized as a mere shareholder of its wholly owned U.S. subsidiary Alcancorp) lacked standing to challenge the constitutionality of California's application of the unitary tax method to the incomes of Alcan and its nearly

---

the percentages of the business entity's sales, property and payroll within California are averaged. The previously determined net income is then multiplied by the average percentage to arrive at the corporation's tax liability. Petition App. II at A5.

[4] Container Corporation of America v. Franchise Tax Board, 103 S. Ct. 2933, 2960 n.4 (1983) (Powell, J., dissenting).

[5] 103 S. Ct. 2933 (1983).

[6] 103 S. Ct. at 2952 n.26, 2956 n.32.

[7] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

100 non-U.S. subsidiaries operating worldwide.[8] The district court came to that conclusion on the grounds that the unitary tax applied by the Respondents does not result in multiple taxation of Alcan's foreign income nor result in any burden upon foreign commerce.[9] The court of appeals adopted the district court's opinion as its own.

The Government of the United Kingdom submits that the decision below will have a decided and deleterious effect on global trade and investment. That decision flatly contradicts the principles enunciated by the Court in *Japan Line, Ltd. v. County of Los Angeles*,[10] and *Container Corporation* in that: (1) the unitary tax scheme sanctioned therein is incompatible with universally recognized principles of income allocation for tax purposes and inevitably leads to multiple taxation of income of U.K. and other foreign companies, who are also subject to taxation by the foreign countries of their commercial domicile; (2) the decision below vitiates the ability of the United States to speak with "one voice" in matters of foreign commerce and, by opening the door to other States to continue to adopt similarly unitary taxation schemes, invites speaking with a cacophony of voices; (3) the decision below approves a significant State-created disincentive to companies from U.K. and other countries to invest in the United States, thereby imposing a constitutionally proscribed burden on foreign commerce; and (4) the decision below results in a significant and growing burden upon the foreign parent and foreign subsidiaries of multinational corporations which must com-

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[8] The Government of the United Kingdom finds it anomalous that while the worldwide income of Alcan is held eligible for taxation by States of the United States, the parent corporation—a member of the income group which is effectively the subject of taxation—is deemed ineligible to seek review of that taxation method by the courts of the United States.

[9] *See* Pet. App. II at A7-A8, A10.

[10] 441 U.S. 434 (1979).

pile and submit in varying formats to the States of the United States sensitive financial data on the corporations' extraterritorial activities, thereby further impermissibly burdening foreign commerce.

ARGUMENT

A recurring issue before this Court in recent years has centered upon the increasing efforts by States of the United States to bring the income earned by affiliated overseas companies into the tax base to which a State apportionment formula is then applied. Last Term, in *Container Corporation of America v. Franchise Tax Board*, the Court held that the Constitution does not forbid a State to apply unitary taxation to reach the income earned by the foreign subsidiaries of a U.S. parent company.[11]

However, the Court expressly reserved decision on the constitutionality of application of the unitary method where the parent company is *foreign*.[12] Three dissenting Justices stated that an application of unitary taxation to United States activities of a foreign corporation would violate the Constitution.[13]

This case involves a foreign parent, and therefore squarely presents that issue.

The district court purported to base its holding on a finding that Alcan lacked standing and said that it would not reach the merits of Alcan's complaint. However, the district court supported its holding on standing by finding that California had only taxed what it was entitled to tax—a holding on the merits.[14] The court of ap-

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[11] 103 S. Ct. 2933 (1983).

[12] 103 S. Ct. at 2952 n.26, 2956 n.32.

[13] 103 S. Ct. at 2960 (Powell, J. joined by Burger, C.J., and O'Connor, J., dissenting).

[14] Pet. App. II at A7-A8.

peals adopted the opinion of the district court, and affirmed.

If the decision below stands, it portends significant consequences for the foreign commerce of the United States and its commercial relations with the United Kingdom and its other trading partners.

I. The Application Of California's Unitary Scheme To Foreign Corporations Results In Multiple Taxation And Prevents The United States From Speaking With "One Voice" In Regulating Foreign Commerce

A State tax is unconstitutional under the Foreign Commerce Clause if it either (1) "creates a substantial risk of international multiple taxation" or (2) prevents the federal government from "speaking with once voice when regulating commercial relations with foreign governments." *Japan Line, Ltd. v. United States.*[15] The application of California's unitary tax scheme to a foreign parent company and its non-U.S. subsidiaries violates each of these constitutional provisions.

A. *Utilization of a Unitary Tax on U.S. Operations of Foreign Corporations Is Inconsistent With Universally Recognized Principles of Income Allocation and Makes Multiple Taxation Inevitable*

At issue here is the clash of two incompatible and irreconcilable methods of income allocation for tax purposes. One method is the "arm's length" approach, which, as the Court noted in *Container Corporation*, is the universally accepted method adopted by the international community (including the United Kingdom and the United States government) of income allocation for taxation of related corporations.[16] Under the arm's length approach, every corporation, even if closely tied to other corpora-

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[15] 441 U.S. at 451.

[16] 103 S. Ct. at 2950.

tions, is treated for most purposes as if it were an inadependent entity dealing at arm's length with its affiliated corporations, and is subject to tax only by the jurisdictions in which it operates and only for the income it realizes on its own books.[17] The other method is the "unitary business/formula apportionment" method adopted by California and a number of the other States of the United States.[18] This system rejects geographical or transactional accounting, treats as one the separate entities—foreign and domestic—that are comprised by an enterprise, and apportions the aggregate income between the taxing jurisdiction and the rest of the world on the basis of a formula.[19] As the Court noted in *Container Corporation*, California has adopted a taxing system that represents a "serious divergence" from the internationally accepted taxing method adopted by foreign taxing authorities and preferred by the United States government.[20] The unitary system is at odds with the model conventions for the avoidance of multiple taxation adopted by the United Nations and the Organization for Economic Corporation and Development (OECD), and principles adopted by the world community in double taxation treaties.[21]

The ramifications of California's using a different system are significant. Most large corporations have profitable as well as less profitable (and some unprofitable) activities. Under the arm's length system, the profitable

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[17] *Id.*

[18] 103 S. Ct. at 2940.

[19] *Id.*

[20] 103 S. Ct. at 2952.

[21] *See* United Nations Model Double Taxation Convention Between Developed and Developing Countries, arts. 7(2), 9(1), U.N. Doc. ST/ESA/102 (1980); Report of the OECD Comm. on Fiscal Affairs, Model Convention for the Avoidance of Double Taxation With Respect to Taxes on Income and on Capital, arts. 7(2), 9(1) (1977); *see, e.g.*, U.S. Treasury Department's Model Draft Income Tax Treaty of June 16, 1981, arts. 7(2), 9(1), 1 CCH Tax Treaties ¶ 158.

activities pay taxes where the profits are made, and the less profitable or unprofitable ones pay less or no taxes in the jurisdictions where they exist. The unitary method of income allocation, however, assumes that the entire enterprise (the "unit") has the same level of profitability throughout the enterprise; the amount of taxation in a particular jurisdiction is based on a formula considering only the proportion of property, payroll and sales in that jurisdiction.[22]

In *Container Corporation*, the Court cautioned that if California's method of formula apportionment "inevitably" led to double taxation, it would be constitutionally suspect.[23]

However, the Court determined that California need not abandon its apportionment formula method in favor of the arm's length method because double taxation was not inevitable under the former method, and was also possible under the latter method. The Court concluded that it would not "require California to give up one allocation method that sometimes results in double taxation in favor of another allocation method that also sometimes results in double taxation."[24] The Court seems to have suggested that double taxation under either system would be more or less random and would occur with equal frequency. This suggestion is incorrect.

First. Double taxation or undertaxation engendered by California's apportionment scheme is not merely incidental; it is inevitable because the fundamental assumptions underlying the California scheme allocate income to a given jurisdiction in proportion to the wage rates, property values and sales prices in that jurisdiction (rather than upon the income actually earned in that jurisdiction as calculated by the arm's length method).

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[22] 103 S. Ct. at 2943.

[23] 103 S. Ct. at 2954.

[24] 103 S. Ct. at 2954-55.

Thus, if a corporation earns income in non-U.S. jurisdictions whose wage rates, property values and sales prices are lower than the corresponding rates, values and prices in California,[25] California *systematically* allocates only a proportion of that foreign income to the foreign jurisdiction where it is earned, thereby subjecting the unallocated portion to State tax in California notwithstanding the fact that such income has been taxed by the host country under internationally accepted principles of taxation. The petitioner Alcan's experience provides a vivid illustration of the unavoidable double taxation trap created by California's apportionment scheme.

As Alcan demonstrated below, in years when its U.S. operations were unprofitable and its foreign operations showed profits, it nonetheless paid California income tax.[26] Since Alcan's U.S. operations had no net income to tax, the "income" upon which the California tax was based could only have been obtained by California through the allocation of Alcan's foreign income to California pursuant to the California apportionment formula. However, pursuant to accepted international practice, all of this income was also taxed previously in the country of origin. Thus, Alcan's experience in California points up the double taxation of foreign companies inherent in the allocation method, and leaves no doubt that this result is neither a random occurrence, nor a matter of mathe-

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[25] This is not an infrequent occurrence. In his report to Congress, the Comptroller General noted that although there have been no definitive studies measuring differences in the values of apportionment factors between the United States and foreign countries, "available evidence from independent researchers does indicate that property values and wages, even after adjustments for productivity differences, may be substantially lower in many foreign countries than in the United States." Report by the Comptroller General to the House Comm. on Ways and Means: Key Issues Affecting State Taxation of Multijurisdictional Corporate Income Need Resolving 37 (GAO/GGD-82-38 (1982)).

[26] Pet. App. III at 17.

matical imprecision, but is rather an inevitable consequence of the application of the unitary scheme.

The only conceivable way whereby the California apportionment formula would not result in double taxation would be if the income allocated to California pursuant to the apportionment formula were *identical* to the income actually earned by the corporation in California. This is at best a very rare event, and the realities are to the contrary as evidenced by the widespread international concerns voiced by the United States' trading partners with respect to the perpetuation (and likely proliferation) of the unitary method.

In *Japan Line*, this Court declared that "[e]ven a slight overlapping of tax" upon foreign commerce warrants close scrutiny.[27] Such scrutiny is clearly warranted here.

Second. It is true that differences in the allocation of income and expenses among national tax jurisdictions employing the arm's length method can also result in double taxation or undertaxation. This effect can be produced by varying accounting systems, exchange rates, and other similar causes. However, these differences, being those of inconsistent application of the same principle, can be eliminated and are susceptible to resolution through international negotiation and bilateral and multinational tax treaties.

By contrast, the inherent double taxation arising out of the apportionment method occurs because that method has an entirely different principle for deciding where income is earned. This difference is irreconcilable. Only in the rare instance where the very different assumptions underlying both systems yield the same result are they consistent with each other.

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[27] 441 U.S. at 456.

B. *Utilization of a Unitary Tax by the States Of the United States Prevents the United States From Speaking With "One Voice" in Regulating Foreign Commerce*

It is a well-recognized and longstanding doctrine of constitutional law that "[i]n international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power." *Board of Trustees v. United States*, 289 U.S. 48, 59 (1933). In *Japan Line*, the Court recognized that a State tax on foreign commerce may frustrate the achievement of federal uniformity, and held that such a tax is unconstitutional if it prevents the Federal Government from speaking with "one voice" in international trade.[28] The Court noted that a state tax would frustrate federal uniformity if it created an "asymmetry" in the international tax structure, or if other States followed the taxing State's example, thereby subjecting foreign commerce to "varying degrees of multiple taxation."[29] In *Container Corporation*, the Court concluded that the California income tax (unlike the California property tax in *Japan Line*) did not violate the Foreign Commerce Clause because: (i) it did not create an "*automatic* asymmetry" in the international tax structure; (ii) the tax fell upon a *domestic* parent company; and (iii) the issue was therefore one of local rather than international concern in that foreign nations had no significant interest in reducing the tax burden of a domestic U.S. corporation.[30]

The present case involves the specific concerns raised by the Court with respect to the California tax in *Japan Line*, and contains none of the distinguishing factors enumerated by the Court in upholding the application of

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[28] 441 U.S. at 451.

[29] 441 U.S. at 450-51.

[30] 103 S. Ct. at 2955-56.

the California tax to United States corporations in *Container Corporation*. Indeed, this case is the very case on which the Court reserved decision in *Container Corporation*.

Moreover, if the apportionment scheme stands, it opens the door for other States to impose analogous schemes, thereby creating a myriad of multiple taxation formats, which in turn would result in the United States speaking with many voices in the realm of foreign commerce.

In *Japan Line*, the Court, in holding a California tax unconstitutional under the Foreign Commerce Clause, declared: "California, by its unilateral act, cannot be permitted to place these impediments before this Nation's conduct of its foreign relations and its foreign trade." [31]

Here, California, by its unilateral act, has established an income allocation and taxation scheme at variance with the international system. This State-created regulation of international earnings is a compelling reason for review by this Court.

II. Utilization Of The Unitary Tax Approach Imposes A Significant Burden On U.K. And Other Foreign Corporations

The unitary apportionment method used by California and other States to allocate income to U.S. offices or subsidiaries of U.K. companies imposes significant administrative burdens on doing business in those States. Under the unitary method, the profit of a foreign company on its U.S. business is derived from a formula taking account of the income of the foreign company and its worldwide subsidiaries as well as the assets, payroll and sales of all such companies. For a U.K. multinational company with many subsidiaries in different countries, the submission

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[31] 441 U.S. at 453.

of financial data for all of these companies to a State of the United States imposes a costly burden. The additional administrative burden results from the need to determine whether foreign corporations should be included in the unitary business group, adjusting foreign financial statements to reflect State income tax laws, and translating foreign currency into U.S. dollars.[32] This burden is extreme in the case of widespread multinational corporations because accounting procedures, language and currencies vary significantly from one foreign country to another. Data may have to be obtained from hundreds of subsidiaries operating in numerous foreign countries, which require a "foreign currency translation" to achieve compatibility with U.S. dollars, a procedure the Comptroller General has characterized as "a laborious task." [33]

The costs of compliance are compounded by the need to prepare separate returns that conform to the varying State tax accounting requirements of the States presently employing some variant of the California scheme. As the Comptroller General has noted, corporate taxpayers must treat the income tax returns for each State separately, and a multijurisdictional taxpayer would have to make "still more calculations for every other area where non-uniformity exists . . . ." [34] This problem will only grow if the decision below stands, and additional States adopt the unitary method.[35]

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[32] *See* Report by the Comptroller General to the House Comm. on Ways and Means, Key Issues Affecting State Taxation of Multijurisdictional Corporate Income Need Resolving 37 (GAO/GGD-82-38 (1982)).

[33] *Id.* at 38-39.

[34] *Id.* at 17.

[35] Prior to the Court's decision in *Container Corporation*, ten States applied unitary taxation on a worldwide basis. Following

Although this burden falls particularly heavily on U.K. corporations because of their extensive U.S. investments, the problem, like the reach of the unitary system, is global.

Underlying all of this is the element of requiring foreign corporations to disclose detailed, highly sensitive information regarding their worldwide operations in order to comply with the accounting requirements of a State of the United States. Moreover, the imposition of a unitary tax—which results in double taxation—has a decided chilling effect on the framework established by the United States and its partners to provide mutual protection for investments.[36]

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the *Container Corporation* decision, Florida adopted a similar system. According to one Florida legislator, "[i]t was like finding money on the street . . . ." *Florida's Legislature Is Latest to Approve Unitary Tax Law*, Wall St. J., July 19, 1983, at 29, col. 1.

[36] Many businesses have stated that they have elected not to locate in California, and others have considered withdrawing because of the unitary tax. *State Taxation of Interstate Commerce and Worldwide Corporate Income: Hearing Before the Subcomm. on Taxation and Debt Management Generally of the Senate Comm. on Finance*, 96th Cong., 2d Sess. 60, 68-71 (1980). This is illustrated by the recent statement of the vice president of the Sony Corporation of America, which commenced operations in California in 1972 prior to California's adoption of the unitary tax:

> "We were very anxious to make things in America. We had to train people, and they had to master new machines, so productivity is low at the beginning. It was expensive and we lost money, but we did it. Then a few years later the tax people came and said we had so much payroll and property in California that we must pay more tax.
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> "I said, 'Don't you tax people where they make money?' They said, 'I'm sorry, Mr. Wada, but we tax where you have property and payroll.' I don't understand this."

Unitary Tax Scope Widens, N.Y. Times, Oct. 18, 1983, at D2, Col. 1.

CONCLUSION

For these reasons, the Government of the United Kingdom respectfully submits that this Court should grant the writ of certiorari.

Respectfully submitted,

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